

The relation between Forced Labour and Trafficking in Human Beings

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Preface

“Even a journey of a thousand miles must begin with one single step”

- Lao Tse -

The first time that I got in touch with Trafficking in Human Beings was during a seminar I followed on the occasion of the presentation of a new book written by dr. mr. Rijken. Several months later I could not have guessed that the title of that book, *Combating Trafficking in Human Beings for Labour Exploitation*, would sound as familiar as it does now. The journey through the world of terms like ‘forced labour’, ‘trafficking in human beings’ and ‘exploitation’ was a long but interesting one. The amount of information regarding these phenomena is immense and sometimes it was difficult to oversee the task and focus on my actual research. In the field of international law it is easy to lose yourself and before I knew it I was spending hours on reading a report that turned out to be outdated, revised or it was on a slightly different element of the subject. Studying International and EU Law, it is sometimes frustrating to notice how many international documents are agreed upon, only to find out that they are vaguely or not at all been implemented or lived up to. I believe that in the field of forced labour and trafficking in human beings enough is being done at international level but the real work needs to be done at the ground, at national level.

Luckily I could not have a better supervisor regarding this subject, Conny Rijken, the author of the book that created my interest for the subject in the first place. I would like to thank her for her guidance on the topic and the critical notes during the whole process. If you would compare my work in the early stages with the end result, you would understand what I mean. Furthermore, I would like to thank my girlfriend for her support and of course the never-ending, sometimes much needed, motivation. Speaking about motivation, I would also like to thank my friends who were always interested in my progress and encouraged me when I was sometimes working late at night. Before starting to become too sentimental I obviously would like to thank my parents. Without their immense support I could not have studied this long and enjoyed it as much as I did.

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Abbreviations

ALP	Association of Labour Providers
ATC	Anti-Trafficking Coordinator
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EHRC	Equality and Human Rights Commission
EU	European Union
FRA	Fundamental Rights Agency
GRETA	Group of Experts on Action against Trafficking in Human Beings
GLA	Gangmaster Licensing Authority
HRA	Human Rights Act 1998
ILO	International Labour Organization
ICTY	International Criminal Court for the former Yugoslavia
ICC	International Criminal Court
JCHR	Joint Committee on Human Rights
NGO	Non-Governmental Organization
NMW	National Minimum Wage
SPA-FL	Special Action Programme to combat Forced Labour
SOCA	Serious Organised Crime Agency
TEU	Treaty of the European Union
THB	Trafficking in Human Beings
UK	United Kingdom
UKHTC	United Kingdom Human Trafficking Centre
UN	United Nations
UNCTOC	United Nations Convention against Transnational Organised Crime

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1 Introduction

1.1 Background

On June 1st 2012 the International Labour Organization (ILO) launched its new global estimate of forced labour. A shockingly 20.9 million people, adults and children, are trapped in jobs into which they were coerced and which they cannot leave. Forced labour is a very broad term which entails everything from debt bondage and prostitution to trafficking in human beings. The ILO Convention C29 about forced labour gives a definition in article 2: 'forced or compulsory labour shall mean 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'. Despite the fact that the C29 Convention was drafted in 1930, this definition is still widely used. A general feature of forced labour is the exercise of coercion and the denial of freedom.

Forced labour is often not a stand-alone crime by means that not many countries have introduced straightforward criminal legislation against forced labour. Many countries embedded the prohibition of forced labour in their constitution or in national human rights legislation, therefore making it hard to enforce. Another problem is that in some countries forced labour is only punishable as outcome of trafficking in human beings (THB), while other countries do not require this element of THB. It is important to understand that forced labour and THB are two concepts which are connected but that not all forced labour is a result of trafficking and that not all trafficking ends in forced labour. The people who find themselves in non-trafficked forced labour thus sometimes have difficulties seeking justice.

In a paper of Klara Skrivankova, 'Between decent work and forced labour: examining the continuum of exploitation', the author describes several countries and their effort and struggle to implement the prohibition of forced labour in their national legislation. A lot of countries is experiencing the same problem. They use a 'too narrow' (forced labour only linked with trafficking) or a 'too broad' (comparison with human dignity standards) concept for implementing the prohibition.

The ILO has developed an agenda for the community of work, the Decent Work Agenda. By integrating Decent Work Country Programmes the ILO aims to support everybody within the working community. The introduction of this programme is important because one of its goals is to 'take back' forced labour as a violation of labour and human rights, rather than solely being dealt with in the anti-trafficking framework.

As mentioned before, a lot of situations fall on the axis between decent work and forced labour but experience shows that there are two aspects that prevent a lot of people to seek for justice either under criminal law or labour law: the impunity of the violators and the poor access to rights of those exploited.

1.2 Purpose and research goal

One of the goals of this thesis is to come up with recommendations which will help people to understand the relation between different related phenomena (such as forced labour, labour

exploitation and trafficking in human beings). By understanding these relations it will be more easy for victims of labour exploitation to determine their own situation and position. This will help people to find the best possible remedy, through the appropriate field of law. Furthermore I will try to come up with a solution for the fact that forced labour is often not a standalone crime and I will investigate the need and/or desirability for an European variant of the Gangmaster Licensing Authority.

The aforementioned research goals lead to the following research question:

What is the relation between forced labour and trafficking in human beings and how will the separation of these two phenomena help in the combat against forced labour?

In order to answer this question I will use the following sub-questions:

- What is forced labour and what is trafficking in human beings?
- What is the concept of 'the continuum of exploitation' created by Klara Skrivankova and how does it help to better identify particular situations?
- How can different fields of law (criminal-, labour- and human rights law) contribute in the battle against forced labour? What international and UK law is applicable?
- What is the role of the Gangmasters Licensing Authority in the United Kingdom? Is it effective? Should there be such an act at European level?
- What is the current situation in the United Kingdom regarding forced labour and trafficking in human beings?

1.3 Methodology

In order to come to an answer to this research question the following matters will be discussed: in chapter two I will start with the definitions of trafficking in human beings and forced labour and discuss the different international documents which regulate these phenomenon. I will also give a more indebt analysis regarding trafficking and forced labour such as their relationship and the requirement of criminalization of both offences. In chapter three I will describe the 'continuum of exploitation', a concept mentioned by Klara Skrivankova (2010), and explain why this concept is very useful when we want to extract forced labour from the trafficking framework and how the continuum is used for determining the proper type of remedy for victims. Chapter four will be about the different fields of law that are related to the phenomenon of THB and forced labour such as labour law, criminal law and human rights law. For both the European Union and the United Kingdom I will describe the relevant provisions of these fields of law regarding trafficking and forced labour. In chapter five the Gangmaster Licensing Authority will be analysed. I will give an overview of their work and review the effectiveness of that work. In the end I will try to determine whether the GLA is an example to be followed. Chapter six will contain information about the labour courts in the UK, the trafficking for labour exploitation situation in the UK and the role of the courts regarding the compensation of victims. Finally, chapter seven will contain my conclusions.

United Kingdom

The reason that I will investigate the situation in the United Kingdom (UK) is the fact that the government established the 'Gangmaster Licensing Authority', an agency set up to protect workers

from exploitation in agriculture, horticulture, shellfish gathering and food processing and packaging. The need for such an agency, and the control of gangmasters (labour providers) was highlighted by the death of several young Chinese workers on February the 5th 2004. The Gangmaster Licensing Authority (GLA) was set up to specifically protect workers and drive out illegal practices and exploitation in the food production industry.

In the UK 95% of the workers in the sectors that the GLA will regulate, is foreign and recruited in their home country. The workers are required to pay a fee to the recruiters (for transport, administrative issues and stay) which they often cannot pay due to their financial and social status. When a foreign worker cannot pay this fee the recruiter often lends him the money, resulting in a debt. This construction creates what the GLA is calling 'bonded labour'. The foreign workers often feel that they cannot leave their employer until this debt is repaid. This happens under pressure by threatening them or their family in the UK or even in the country of origin. The GLA hopes that by licensing labour providers these practices are ended. Since October 2006 it is a criminal offence for a labour provider (agency) not to have a license and since December 2006 for an entity who hires people from an agency to use workers from an unlicensed provider.

With regard to the concept of the 'continuum of exploitation' and the creation of the GLA, I will try to come up with several recommendations in the field of combatting trafficking in human beings for labour exploitation.

In general I will start with an examination of the literature to collect relevant information that should give a clear description of the problem mentioned above. Relevant literature would be the ILO Conventions No. C29 and C105, international documents regarding trafficking in human beings, annual reports in the field of forced labour, ILO publications on forced labour and trafficking, books of respected researchers and academics in this field, reviews of the GLA and the paper of Klara Skrivankova. In their book, a manual on inter alia writing a thesis, IJzermans and van Schaaijk¹ state that after the description of the current knowledge it is necessary to generate 'new' knowledge, for example creating a new theory or improve an existing one. How to do this depends of course on the object of the research. This particular thesis asks for an empirical method, which means that I will use a collection of data to base a (self-created or existing) theory or derive a conclusion. Furthermore I might use what is called 'rational reconstruction', the reconstruction of the system of rules, because there is a possibility that this thesis will recommend a reconstruction of national or European legislation. The final method that will be used is the hermeneutic method, which means the interpretation of a text, to determine the meaning of the present rules. Most of my research will contain of desk study and comparisons of different views on the same subject in order to find the best practices.

¹ IJzermans & van Schaaijk, "*Oefening baart kunst: onderzoeken, argumenteren en presenteren voor juristen*", Centraal Boekenhuis 2007

2 Definitions

In this chapter I will discuss several definitions of terms and provisions that will be important throughout the rest of this thesis as well as a more indebt analyses on these terms and provisions. Furthermore, relevant international law documents are mentioned.

2.1 What is trafficking in human beings

Towards the end of the twentieth and the beginning of the twenty-first century trafficking in human beings started to become a major international problem. Globalization, an ever increasing difference in wealth within and between countries and an increasing demand for cheap labour in developed countries were the main reasons for this phenomenon to arise. People who live in absolute poverty and who have no (in)direct potential to increase their living standards are willing to migrate to the developed western world, often influenced by the images of wealth and prospect shown via the new media channels. Although legal travel across international borders into the developed world became far easier due to the technical revolution, it is mainly preserved for people with a high educational skill or a privileged financial position. An issue to keep in mind is the difference between a smuggler, who merely provides an illegal service to a migrant, e.g. the crossing of an international border in an illegal manner, and a trafficker, whose services go far beyond this border crossing act. A trafficker is often part of a much larger and wider network and seeks to exploit the person after the migration, to gain personal profit.

The first international legal document that tried to combat trafficking in persons was the 1904 International Agreement for the Suppression of the White Slave Trade², which was back then signed by sixteen European states³. The central issue in this document was the recruitment of prostitutes, not the exploitation (of women). This 1904 Agreement was quickly followed by the 1910 International Convention for the Suppression of the White Slave Traffic⁴. New in this Agreement was the fact that it also addressed trafficking within one country. These two agreements were later complemented by two conventions of the League of Nations in 1921 and 1933⁵. Finally, the UN Convention of 2 December 1949⁶ was the first attempt to address trafficking (process) and exploitation (result) simultaneously. It replaced the four earlier mentioned documents and dealt with both trafficking and exploitation.⁷ Article 1 of this Convention states:

The Parties to the present Convention agree to punish any person who, to gratify the passion of another:

- 1) *Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;*

² International Agreement for the Suppression of the White Slave Trade, 18 May 1904, 35 Stat. 426, 1 LNTS 83.

³ Rijken, 'Trafficking in persons: prosecution from an European perspective', Asser Press 2003, p. 54

⁴ International Convention for the Suppression of the White Slave Traffic, 4 May 1910, III LNTS 278

⁵ Convention for the Suppression of Traffic in Women and Children, 30 September 1921, 9 LNTS 415, and the International Convention for the Suppression of the Traffic in Women of Full Age, 11 October 1933, 150 LNTS 431

⁶ Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, in force since 25 July 1951, 96 UNTS

⁷ Rijken, 'Trafficking in persons: prosecution from an European perspective', Asser Press 2003, p. 55

2) *Exploits the prostitution of another person, even with the consent of that person.*

In 2000 the United Nations (UN) General Assembly adopted the protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereafter: the Palermo Protocol or Trafficking Protocol)⁸. The Palermo Protocol is a protocol to the UN Convention against Transnational Organised Crime, UNTOC, and defines trafficking in human beings in article 3 (a) as:

'The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other terms 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 other or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.'

The above mentioned definition was the first time that states reached agreement on a definition of trafficking in persons on a broad international level. The definition merged two phases in the trafficking process, namely the recruitment and transport phase as well as the exploitation phase⁹. The participating parties in the end also decided upon the inclusion of article 3(b) that stipulates that the consent of a victim of trafficking in persons to the intended exploitation is irrelevant where a form of coercion, listed in article 3(a), has been used¹⁰. Article 3(c) furthermore stipulates that in case of children (persons younger than eighteen, article 3(d)) the recruitment, transportation, transfer, harbouring or receipt shall be considered THB, even when this does not involve any of the means set forth in paragraph (a).

Reading this definition it is evident that trafficking in persons has three constituent elements, being "the act" (what is done), "the means" (how it is done) and "the purpose" (why it is done). Only a combination of these elements constitutes the crime of trafficking in human beings. The first element, "the act", is critical in establishing the scope of the Trafficking Protocol's definition. The addition of the terms 'harbouring' and 'receipt', compared with the former definition in the 1949 UN Trafficking Convention, raises the question whether the Trafficking Protocol only deals with the process or that it also covers the result aspect. This is not the case because by adding the two new terms, the breadth of the action element has the effect of bringing, within potential reach of the definition, not just recruiters, brokers and transporters but also owners and managers, supervisors, and controllers of any place of exploitation such as a brothel, farm, boat, factory, medical facility, or household.¹¹ This could result in situations of exploitation, in which there was no preceding process of physically looking for people (recruitment) or physically moving them (transportation and transfer). Situations such as intergenerational bonded labour and changing working environments

⁸ UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, available at: <http://www.unhcr.org/refworld/docid/4720706c0.html> [accessed 17 April 2012]

⁹ Rijken, *Trafficking in persons: prosecution from an European perspective*, Asser Press 2003, p. 66

¹⁰ Rijken, *Trafficking in persons: prosecution from an European perspective*, Asser Press 2003, p. 67

¹¹ A. Gallagher, *The international law of human trafficking*, Cambridge University Press 2010, p. 30

from acceptable to coercively exploitative.¹² Therefore the definition does not just refer to the physical part of the process; it extends to include the maintenance of a person in a situation of exploitation and thereby expanding the group of possible perpetrators.¹³ However, there is no evidence that States did want to expand the scope of the concept of trafficking. Contrary, it looks like States wanted to limit the possible scope of the concept of trafficking through the development of the three-part test (act, means, purpose).¹⁴

Regarding the second element, 'the means', it is important to notice that 'coercion' is central to the idea of trafficking. Coercion separates trafficking from related phenomena such as migrant smuggling. In the definition, coercion is linked with the threat or use of force, together also known as the 'direct means'. Coercion and force are distinguished from the 'indirect means' such as fraud and deception, or in other words: psychological coercion.¹⁵ From the phrase 'or any other forms of coercion' in article 3 (a) it can be concluded that the coercive element must be understood in a broad sense also including forced labour, slavery and slavery-like practices¹⁶. The abuse of vulnerability is a means of coercion introduced in the Palermo Protocol to broaden the scope of possible coercive means used by traffickers in addition to the direct physical abuse.¹⁷

The third and final element of the definition is the 'purpose' element. The 'purpose' or the goal of the trafficking is important because even when the purpose (e.g. forced labour) hasn't occurred yet, trafficking can be found and prosecuted, when it is clear that the intended purpose is exploitation¹⁸. Trafficking will occur 'if the implicated individual or entity intended that the action would lead to one of the specified end results.'¹⁹ One of the core parts of the 'purpose' element is 'exploitation'. According to the second paragraph of article 3(a) of the Palermo Protocol 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'. This phrase is explicitly not a definition of exploitation but rather an open-ended list. This addition to the trafficking definition however, is important because it shows that exploitation is not only sex-related, a commonly mistaken assumption, but that forced labour can be a form of exploitation as well. Once the process of trafficking reached its goal, in this case forced labour, the phenomena of trafficking and forced labour are linked: forced labour is sometimes an outcome of trafficking. The fact that forced labour is mentioned in the list extends the end purpose of trafficking, by including the most seriously exploitative work situations.²⁰

Article 4 of the European Convention on Human Rights (ECHR or 'the Convention') is also important with regard to the definition of human trafficking. Article 4 protects people against slavery, servitude and forced or compulsory labour and although article 4 ECHR does not mention trafficking, due to the *Rantsev case*²¹ human trafficking nowadays does fall within the scope of article 4. The judgement

¹² *Ibid.*, p. 31

¹³ *Ibid.*, p. 47

¹⁴ *Ibid.*, p. 31

¹⁵ *Ibid.*, p. 31

¹⁶ Rijken, *Trafficking in persons: prosecution from an European perspective*, Asser Press 2003, p. 67

¹⁷ *Ibid.*, p. 4

¹⁸ Klara Skrivankova, *Between decent work and forced labour: examining the continuum of exploitation*, Joseph Rowntree Foundation 2010, p. 8

¹⁹ A. Gallagher, *The international law of human trafficking*, Cambridge University Press 2010, p. 34

²⁰ *Ibid.*, p. 35

²¹ *Rantsev v. Cyprus and Russia*, App. No. 25965/04 (7 January 2010)

in *Rantsev* created the positive obligation upon States who ratified the Convention to investigate allegations of trafficking and to implement measures to prevent and protect people from human trafficking²². The reasoning of the European Court of Human Rights (ECtHR) was that it had the obligation to interpret the Convention 'in light of present-day conditions' and therefore decided that 'trafficking itself, within the meaning of article 3(a) of the Palermo Protocol and article 4(a) of the Anti-Trafficking Convention, falls within the scope of article 4 of the Convention'²³. The Court also stated that 'trafficking is a problem which is not often confined in the domestic arena. When a person is trafficked from one State to another, trafficking offences may occur in the State of origin, any State of transit and the State of destination'.²⁴ In other words: States have the positive obligation for mutual cooperation to investigate trafficking together. The Court in *Rantsev* established therefore three obligations that arise from article 4 ECHR:

- States must create a legislative and administrative framework to prohibit and punish trafficking;
- States are required to take measures to protect victims or potential victims of trafficking where circumstances give rise to a credible suspicion of trafficking;
- States have a procedural obligation to investigate situations of potential trafficking not only domestically but to cooperate effectively with other states concerned.

2.1.1 The relation between the UN Convention against Transnational Organized Crime and the Palermo Protocols

The Palermo protocols are supplementing the United Nations Convention against Transnational Organized Crime which was adopted by General Assembly resolution 55/25 of 15 November 2000, and therefore it is important to understand the relation between the Convention and the Trafficking Protocol. This relation is explained in article 1 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children and in article 37 of the Palermo Convention. Several basic principles of this relation are²⁵:

- No State can be party to (any of) the Protocol(s) unless it is also a party to the Convention (Art. 37, para. 2, of the Palermo Convention);
- The Convention and the Protocol must be interpreted together (Art. 37, para. 4, of the Palermo Convention and Art. 1, para. 1, of the Protocol);
- The provisions of the Convention apply, mutatis mutandis (with the necessary modifications), to the Protocol (Art. 1, para. 2, of the Protocol); and
- Offences established in accordance with the Protocol shall also be regarded as offences established in accordance with the Convention (Art. 1, para. 3, of the Protocol). This means that any offence established by a State in order to criminalize THB as required by article 5 of the Protocol will automatically be included within the scope of the basic provisions of the Convention, such as extradition and mutual legal assistance.

²² As found on: <<http://www.hrlc.org.au/court-tribunal/european-court-of-human-rights/rantsev-v-cyprus-and-russia-2010-echr-2596504-7-january-2010/>> [accessed 16 May 2012]

²³ *Rantsev v. Cyprus and Russia*, App. No. 25965/04 (7 January 2010), paragraph 282

²⁴ *Rantsev v. Cyprus and Russia*, App. No. 25965/04 (7 January 2010), paragraph 289

²⁵ ILO, *Human Trafficking and Forced Labour Exploitation: guidance for legislation and law enforcement*, Geneva: ILO 2005, p. 8

- The Protocol's requirements are a minimum standard. Domestic measures may be broader in scope or more severe than those required by the Protocol, as long as all obligations specified in the Protocol have been fulfilled. (Art. 34, para.3 of the Convention).

One consequence that arises from the fact that this protocol is a protocol to UNCTOC, is that THB must have a transnational character and must be conducted as an organised crime. The UN Office on Drugs and Crime stated that although these elements were required for UNCTOC to apply, they should not be posed as elements in the definition of THB in national laws.²⁶ In other words: the Palermo Convention applies when the offences are transnational in nature and involve an organized criminal group (as stated in article 34, paragraph 2 Palermo Convention) but that this does not mean that these elements are to be made elements of the domestic crime of trafficking. Adding elements of trans-nationality or organized crime will only complicate the investigations by the national police forces.

2.1.2 Additional information on the Trafficking Protocol

Article 2 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, explains its overall purpose:

- To prevent and combat trafficking in persons, paying particular attention to women and children;
- To protect and assist victims of such trafficking, with full respect for their human rights; and
- To promote cooperation among States Parties in order to meet those objectives.

It is clear that these three objectives need to be dealt with through different types of legislation. Preventing trafficking for example will require a strong intelligence-led police action, while the protection of victims will require administrative law relating to foreigners in the country of destination²⁷.

Another important article of the Protocol is article 5, paragraph 1, which requires the criminalization of THB as defined in Article 3. It stipulates that the following activities must be criminalized:

- Attempting to commit the offence of trafficking in persons, subject to the basic concepts of its legal system;
- Participating as an accomplice in the offence; and
- Organizing or directing other persons to commit the offence.

In addition the Protocol provides, in part two, for measures to be taken regarding the protection of victims (artt. 6, 7 and 8). It is a fact however, that many commentators²⁸ are disappointed that there is very little "hard" or detailed obligation in these articles.²⁹ State Parties are required to take certain measures but the tone of the articles is very permissive legislation such as minimum standards and unspecified types of compensation. A good example is the text of article 6(3) of the Trafficking

²⁶ C. Rijken, *'the EU legal framework on combating THB for labour exploitation'*, in Conny Rijken (ed.), 2011: Combating Trafficking in Human Beings for Labour Exploitation, p. 394

²⁷ ILO, *Human Trafficking and Forced Labour Exploitation: guidance for legislation and law enforcement*, Geneva: ILO 2005, p. 7

²⁸ See footnote 195 in A. Gallagher, *'The international law of human trafficking'*, Cambridge University Press 2010

²⁹ A. Gallagher, *'The international law of human trafficking'*, Cambridge University Press 2010, p. 83

Protocol: 'Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of THB...' All these measure will include services such as health care, housing and employment. Given the expected high costs of such measures, and the fact that every State in which victims are found would be bounded to this provision, the provision is precluded from being made obligatory.³⁰

2.2 What is forced labour

In 1930 the International Labour Organization (ILO) adopted the Forced Labour Convention C29³¹. In article 2(1) it gives a definition of the term forced labour:

'All work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'

This definition is used ever since the adaptation of this Convention when a treaty, protocol, convention, government etc. is mentioning forced labour. Four important elements can be distinguished when reading this definition: 'work or service performed', 'any person', 'penalty', and the 'voluntary offer'. The Committee of Experts³² gave further guidance on these elements in one of their reports concerning the application of the forced labour Convention in 2002.

The element of 'all work or service' includes all types of work, service and employment, without distinction of the industry or sector. Noticeable is that it includes legal but also illegal employment.³³ The Committee of Experts of the ILO stated that the obligation to undergo compulsory education is not 'work or service' exacted under the menace of a penalty. The element of 'any person' means that there is no distinction between adults or children and nationality. Furthermore it is irrelevant that a person is a national of the country in which the forced labour has been identified.³⁴

The phrase 'menace of any penalty' refers to both criminal sanctions as well as different forms of coercion such as threats, violence and non-payment of wages. The Committee of Experts feels that the phrase 'menace or penalty' must be construed broadly. It 'need not only be in the form of penal sanctions', but the 'loss of rights or privileges' are also possible situations of 'menace or penalty'. E.g. promotion, transfer, housing etc.³⁵ Regarding the possibility that psychological coercion or economic compulsion amounts to a penalty within the meaning of the ILO, the ILO supervisory bodies decided that psychological coercion might result in a 'menace of a penalty' but that economic coercion does not.³⁶ In this latter situation the supervisory bodies did not want to equate the situation that a worker needs his job just for financial reasons, as a situation 'under menace of any penalty'. The Committee of Experts states that the employer or State is 'not accountable for all external

³⁰ A. Gallagher, *The international law of human trafficking*, Cambridge University Press 2010, p. 83 and *Legislative Guide*, at 288

³¹ International Labour Organization (ILO), *Forced Labour Convention, C29*, 28 June 1930, C29, available at: <http://www.unhcr.org/refworld/docid/3ddb621f2a.html> [accessed 18 April 2012]

³² The Committee of Experts will be further addressed in 4.2.1

³³ ILO, *Combating forced labour: a handbook for employers and business*, 2008, p. 8. Available at:

http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_101171.pdf

³⁴ *Ibid.*

³⁵ ILO, *Forced Labour and Human Trafficking: Casebook of Court Decision*, International Labour Organization, Geneva: ILO 2009, p. 12

³⁶ *Ibid.*

constraints or indirect coercion existing in practice... [thus] the need to work in order to earn one's living could become relevant only in conjunction with other factors for which they are answerable'.³⁷ So the ILO supervisory bodies are very hesitant to accept the argument that 'a general situation of economic constraint that keeps a worker on a job is equivalent to the menace of any penalty'.³⁸

The term 'penalty' is also discussed in *Siliadin v. France*³⁹. In this case the European Court of Human Rights (ECtHR) added that a penalty does not necessarily have to be imposed on an individual for them to be considered a victim⁴⁰. According to the ECtHR, it is adequate that the victim feels that he/she has been penalized by the perceived seriousness of the threat he/she was under⁴¹. Even in the situation where people voluntarily work, they may eventually revoke their consent because of terrible working conditions⁴².

Regarding the element of 'voluntary offer' the Committee of Experts noted that work accepted under the menace of a penalty is not work accepted voluntarily. In other words, there is no voluntary offer under threat. This is the same when deceit and fraud are involved in the work offer.⁴³ The question in this regard consists of two parts: is the consent to work freely given, and is the worker able to revoke his consent.⁴⁴ Sometimes it is difficult to determine whether a worker voluntarily entered a forced labour situation. Often they entered into the situation by own choice only to find out later that they are not free to withdraw from the labour situation or that they cannot withdraw their consent to work, which they possibly gave involuntarily or unknowingly.

Forced labour is furthermore criminalized in article 25 of Convention C29:

'the illegal exaction of forced labour 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 are strictly enforced'

In 1957 the ILO drafted the Abolition of Forced Labour Convention 1957 (No. 105).⁴⁵ Convention C105 specifies in its first article that 'forced labour can never be used for the purpose of economic development or as a means of political education, discrimination, labour discipline, or punishment for having participated in strikes'. Despite this addition, Convention C105 made no changes to the definition of forced labour compared to Convention C29: "while Convention No. 105 is the more recent instrument, it builds on the foundation laid down by Convention C29 to prohibit forced or

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Siliadin v. France*, 43 ECtHR 16, 36 (2006)

⁴⁰ C. Rijken and E. de Volder, 'The European Union's Struggle to Realize a Human Rights-Based Approach to Trafficking in Human Beings: A call on the EU to Take THB-sensitive Action in Relevant Areas of Law' (2009) Connecticut Journal of International Law, Volume 25, No. 1, p. 61.

⁴¹ *Siliadin v. France*, 43 ECtHR 16, 36 (2006)

⁴² *Van der Müsselle v. Belgium*, 6 ECtHR 163, 175 (1984)

⁴³ Individual Observation Concerning Peru, 87th session, Geneva, 1999, para. 3 (nothing that certain forms of deceitful or violent recruitment of labour were forced labour).

⁴⁴ ILO, Forced Labour and Human Trafficking: Casebook of Court Decision, International Labour Organization, Geneva: ILO 2004, p. 13.

⁴⁵ International Labour Organization (ILO), *Abolition of Forced Labour Convention, C105*, 25 June 1957, C105, available at: <http://www.unhcr.org/refworld/docid/43fdeb602.html>

compulsory labour in specific instances. Convention C29, on the other hand, lays down a general prohibition on forced labour and compulsory labour, admitting only a few exceptions".⁴⁶

The ILO created a list of indicators which can help to determine whether there is a situation of forced labour and to better explain the confusions around freedom to leave and freedom of choice. These indicators are:

- Threats of or actual physical or sexual violence;
- Restriction of movement and confinement, to the workplace or to a limited area;
- Debt bondage' (a situation where a worker works to pay off debt or loan, and is not paid for his or her services);
- Withholding of wages, refusing to pay the worker at all or excessive wage reductions;
- Retention of passports and identity documents;
- Threat of denunciation to the authorities.

If two or more of these indicators are present, the ILO considers the presence of forced labour very likely⁴⁷. These indicators are not always an element of forced labour but should be read as signals to investigate the situation further. Generally it is important to check if the worker gave his consent and if he/she is free to leave.

2.3 Analyses

In this section I want to point out several more in-debt analyses about THB and forced labour. Is there a special connection between the two? Is there any criticism towards the definition?

Even though there is now a worldwide consensus on the definition of trafficking that does not mean that there isn't still some discussion going on about the definition. It has been argued that the three-element structure of the definition creates a situation in which States are not obliged to do anything about the actual exploitation as the end purpose of trafficking and that the definition is constrained by the 'element of means' requirement discussed before.⁴⁸ This is however not at all limiting the scope or impact of the definition and thereby the legal obligations that arise from it, because in practice it will be very hard to find a contemporary form of exploitation that would not fall within the definition.⁴⁹ Anne T. Gallagher (2010) gives several examples of contemporary exploitative practices where there is always a situation of trafficking, such as the traditional debt bondage systems of South Asia, slavery in Africa, the Australian sex industry, the Russian construction sector and on the cocoa farms of Ivory Coast.⁵⁰ In all these cases the elements of act, means (not in cases concerning children) and purpose are present.

⁴⁶ ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A) International Labour Conference, 85th session, Geneva, 1998, paragraph 105.

⁴⁷ International Labour Organization (ILO), *Human Trafficking and Forced Labour Exploitation. Guidelines for Legislation and Law Enforcement*, 2005, p. 20

⁴⁸ Hathaway, "The Human Rights Quagmire of Human Trafficking", p. 10 and 11. Available at http://scs.student.virginia.edu/~vjil/PDF/49_1-59.pdf

⁴⁹ A. Gallagher, *The international law of human trafficking*, Cambridge University Press 2010, p. 47

⁵⁰ *Ibid.*, p. 48

In their 2007 General Survey on the application of the forced labour Conventions, the ILO Committee of Experts stated that the purpose of trafficking, being exploitation, is the most crucial element of the trafficking definition.⁵¹ According to the committee, this element is specifically defined to include inter alia forced labour or services. Therefore, a link is established between the Palermo Protocol and Convention C29. The Committee: ‘the notion of exploitation of labour in the trafficking definition makes clear that trafficking in persons for the purpose of exploitation is encompassed by the definition of forced or compulsory labour provided under Article 2, paragraph 1, of Convention C29.’⁵² When understanding this link between the Protocol and the Convention, the requirement of implementing both instruments at national level is less difficult to understand. By criminalizing both trafficking and forced labour separately, both crimes are more easily prosecuted.

According to the 2009 ILO Global Report on Forced Labour⁵³ a forced labour situation is determined by the nature of the relationship between the worker and his employer, not by the nature of the work itself. Even the legality or illegality of activity under national law is not relevant when determining whether or not the work is forced. Furthermore, an activity does not need to be recognized as an ‘economic activity’ to potentially be forced labour. E.g. the situation where a child is begging under coercion will, be considered as being forced labour.⁵⁴

While the 2005 ILO Global Report stated that the vast majority of ILO Member States have ratified one or both of the ILO’s Conventions on forced labour but also that many of them did not specify the offence of forced labour in their criminal law, the 2009 ILO Global Report states that most countries do have legislation that deals with forced labour as a serious criminal offence⁵⁵. However, many countries have included the offence of forced labour in their labour law, which also is a possibility. The ILO has indicated that ‘*the exaction of forced or compulsory labour could be a “penal offence” under either the criminal or labour law (of the state), although “adequate” penalties for this basic human rights violation are more likely to be included in the penal or criminal code. Penal sanctions can be imposed in the forms of fines or imprisonment. Fines should be high enough to act as an effective deterrent.*’⁵⁶ This means that States can choose the mechanism under which they want to penalize the offence of forced or compulsory labour; either under criminal or labour law. A lot of countries prohibit forced labour in their constitution, which is a good development in countries where the constitution is directly enforceable. In other countries it may be necessary to create a legislative prohibition of forced labour. Given the broad potential scope of the concept of forced labour, it is recommended to specify specific offences which add up to a criminal offence of forced labour.⁵⁷

When reading the definition of human trafficking in the Palermo Protocol, one can argue that there is a situation of ‘double coercion’ in the case of THB for labour exploitation. On the one hand the act

⁵¹ ILO, *General Survey concerning the Forced Labour Convention, 1930 (No. C29), and the Abolition of Forced Labour Convention, 1957 (No. 105): Eradication of forced labour*, Report III (Part 1B), Committee of Experts, Geneva 2007, p. 41 at 77

⁵² *Ibid.*

⁵³ ILO, *The cost of coercion: global report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work 2009*, Report (B), International Labour Conference 98th session 2009, p. 6

⁵⁴ *Ibid.*, p. 6

⁵⁵ *Ibid.*, p. 1

⁵⁶ ILO, “*Human Trafficking and Forced Labour Exploitation: Guidance for Legislation and Law Enforcement*”, International Labour Office 2005, Geneva, p. 18

⁵⁷ *Ibid.*, p. 18

must be conducted by means of threat or use of force or some sort of coercion as stated in the definition. This “force” therefore sees to the act. But on the other hand, for trafficking to be established, (in this example) forced labour must be present as a type of exploitation. This means that we can speak of “forced recruitment for forced labour”.

Another important issue regarding THB and forced labour is the statement of an Experts Group on Trafficking in Human Beings, in a report commissioned by the European Union in 2003. This Expert Group identified forced labour exploitation as the ‘crucial element’ of the Trafficking Protocol. According to them ‘policy interventions should focus on the forced labour and services, rather than (or in addition to) the mechanisms of trafficking itself’ to effectively counter trafficking.⁵⁸ The ILO Global Report 2009 emphasizes that there is a need for laws against both forced labour and trafficking.⁵⁹ The reason for this is that not all forced labour practices are necessarily a result of trafficking. Even a case where a migrant worker is subjected to forced labour in a destination country is not always a trafficking case. And not only migrants are the victim of forced labour in the destination countries.

Trafficking in human beings is not just one act. In fact it is a whole process, starting with the recruitment of vulnerable persons and ending with the exploitation of these persons. According to one of the officers of the THB Group of Europol, THB is an ever growing market for criminals and at the moment THB is still low-scaled and relying on dynamic social networks, but the market is also vulnerable to undergo a process of growth and the offence could be here to stay without appropriate action.⁶⁰

⁵⁸ *Ibid.*, p. 7.

⁵⁹ *Ibid.*, p. 7.

⁶⁰ De Jonge, *Eurojust & Human Trafficking: the state of affairs*, Eurojust, October 2005, p. 23

3 The continuum of exploitation

In this chapter I will elaborate on a paper written by Klara Skrivankova for the Joseph Rowntree Foundation, a British social policy research and development charity. In her paper Klara Skrivankova introduces a continuum of exploitation, a possible great and inventive way to understand situations of possible forced labour exploitation.

3.1 Overview

An important publication for this thesis and in the field of forced labour and the relationship with trafficking in human beings is in my opinion the paper of Klara Skrivankova (2010), 'Between decent work and forced labour: examining the continuum of exploitation' (2010). Her paper tries to examine how forced labour is currently framed within national legislations and introduces a continuum of exploitation and interventions, ranging from decent work to the most extreme form of exploitation, being forced labour and covering both criminal- and labour law. Finally the paper uses case studies to demonstrate how the concept of a continuum can be applied in practice in concrete cases. According to Klara Skrivankova (2010) there are numerous different labour situations which make it hard to determine whether there is a case of decent work, extreme exploitation or something in the very large middle. This situation is further complicated by a lack of clear definitions which could indicate the transition points between the various labour situations more clearly.⁶¹

She also states that the international community nowadays is very interested in THB and that governments are required to focus on this particular problem, legislate against it and take action to enforce the legislation. As a result governments did not re-define existing concepts on forced labour, but attempted to define situations either as trafficking or not. As a result, a situation or act, which is not labelled as trafficking, but still can be one of forced labour, is often ignored and not dealt with.

By creating a continuum of experiences and situations, Klara Skrivankova tries to clarify the blurred line between violation of labour standards and forced labour, or in other words, to clarify the line between exploitation in terms of violation of labour rights and extreme violations amounting to forced labour. She argues that a continuum should be used to 'describe the complexity of the exploitative environment and concrete individual situations of workers'.⁶²

3.2 The continuum explained

The common problem a lot of countries struggle with, is that they fit a complex reality in a too narrow or too broad concept. Countries try, for example, to link forced labour only with trafficking or they try to appoint certain conditions contrary to human dignity.⁶³ It is a commonly agreed fact that there is no clear demarking of the beginning and the end of one form of exploitation from another and the absence of a clear definition of exploitation is problematic. Skrivankova (2010) states that

⁶¹ Klara Skrivankova, *'Between decent work and forced labour: examining the continuum of exploitation*, Joseph Rowntree Foundation 2010, p. 4

⁶² *Ibid.*, p. 4

⁶³ *Ibid.*, p. 16

this can lead to what she calls ‘a hierarchy of suffering’, especially when we see forced labour as an extreme form of exploitation compared to ‘lesser’ forms of exploitation such as the violation of certain standard labour laws, leaving the lesser form unattended.⁶⁴

The continuum of exploitation can be approached as a conceptual framework which might help to understand the relation between different related phenomena such as forced labour, labour exploitation and THB. The continuum is also ‘a concept that enables the identification of a remedy for any situation in which a worker finds himself that differs from decent work’. The scheme starts with the positive extremity of decent work up to the negative extremity of forced labour. Along the line we can determine in what sort of situation workers find themselves in what would be the best possible type of intervention, using which field of law. Every situation that is not decent work represents some form of violation of labour standards, ranging from more minor violations (e.g. breach of contract) to the most severe one, forced labour. Furthermore the scheme indicates when trafficking (as a process) is present and when not.⁶⁵ Thus, the continuum can be used in a number of ways:⁶⁶

- To note individual elements of exploitation and identify whether they are covered by either criminal law or labour law (or both);
- To analyse a real situation against the extremities of a desirable and undesirable situation (decent work against forced labour);
- To determine whether the remedies available are accessible for an individual.

Skrivankova gives several specific examples⁶⁷ regarding the points mentioned above. An example of noting an individual element and identifying by which field of law it should be covered, could be the withholding of identity papers. Clearly, this single act falls in the sphere of criminal law while it is a criminal offence of its own. But when we combine this act with acts such as withholding of wages or excessive working hours, the situation would fall within the sphere of mixed intervention because then a situation of forced labour would be present, which should be dealt with through both labour- and criminal law. Regarding the analysis of a real situation against the extremities one could think of the evaluation of compliance with basic labour rights, checking if one of the forced labour indicators is present or to check whether there are indicators that point out a standalone criminal offence. The last point is clear. The continuum can help to discuss whether the remedies available are accessible taking into account possible administrative barriers or other problems.

In other words: a minor violation of the principle of decent work and violations of labour standards could be dealt with through labour law intervention, where as a situation of trafficking requires intervention through criminal law. The continuum shows that situations of forced labour should be labelled both as an issue of labour rights as well as an issue of the criminal justice system. This is shown in the continuum because the situation of forced labour falls within the sphere of criminal law intervention and the sphere of labour law intervention (see the graphic on page 45). Concluding: forced labour, as an outcome of trafficking or not, can be dealt with through both labour and criminal law because the perpetrator can be prosecuted for committing the criminal offence of forced labour, but can also be taken to an employment tribunal (in the case of the UK) for not complying with

⁶⁴ *Ibid.*, p. 18

⁶⁵ *Ibid.*, p. 20

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

existing labour law. This view, the possible use of both labour- and criminal law is also mentioned by the ILO.⁶⁸

Skrivankova states that the use of the continuum to understand and address labour exploitation and situations which can lead to this, can clarify the complex reality of the lack of access to labour rights and the impunity of the perpetrators. The lack of a definition of exploitation is dealt with in several ways. Some countries describe the situation of exploitation as ‘conditions contrary to human dignity’ (e.g Belgium in their criminal code) while other countries, such as Germany, compare ‘normal’ working conditions with ‘abnormal’ ones⁶⁹. Another way to identify exploitation is the use of the ILO indicators for forced labour. All these possibilities can be placed in the continuum, which then can be used to determine the level of exploitation and the corresponding actions against it.

There is one particular statement of Skrivankova that I really like and do not want to withhold from the reader because I believe it touches upon the core of the combat against forced labour exploitation: ‘the motivation, demand and socio-economic factors allowing the exploitation to happen need to be addressed too. Exclusive focus on extreme situations ignores underlying causes of real situations, where the permissibility of lesser forms of violation ensures the existence of forced labour’. This means that the (minor) violations of labour rights are also important to highlight and be dealt with because these violations are the start of a situation of labour exploitation that eventually can or will lead to the most extreme form, being forced labour. That is why labour law and criminal law should work together.

3.3.1 Decent work

The first time someone mentioned the term ‘decent work’ was the Director General of the ILO in 1999 in his report to the International Labour Conference. He described decent work as ‘productive work under conditions of freedom, equity, security and dignity, in which rights are protected and adequate remuneration and social coverage are provided’. The ILO has developed an agenda for the community of work. The ILO wants to help through Decent Work Country Programmes. This new way of operating is achieved by implementing the ILO’s four strategic objectives: creating jobs, guaranteeing rights at work, extending social protection and promoting social dialogue. This ‘Decent Work Programme’ was created through the tripartite structure of the ILO thus by consensus amongst governments, employers and employees. They stated that Decent Work is the key to achieve ‘a fair globalization, reducing poverty and achieve equitable, inclusive and sustainable development’.⁷⁰ It does not come as a surprise that forced labour and trafficking will be highly reduced when these goals are met.

The overall goal of Decent Work is to change people’s lives for the positive at national and local level. Abolishing forced labour is one of the most important ways to achieve this overall goal. The ILO is supporting this Decent Work Programmes by defining the priorities and the targets within national

⁶⁸ ILO, “*Human Trafficking and Forced Labour Exploitation: Guidance for Legislation and Law Enforcement*”, International Labour Office 2005, Geneva, p. 18

⁶⁹ Klara Skrivankova, *Between decent work and forced labour: examining the continuum of exploitation*, Joseph Rowntree Foundation 2010, p. 14

⁷⁰ As found on <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm> [accessed 28 April 2012]

development frameworks and ‘aim to tackle major Decent Work deficits through efficient programmes that embraced each of the strategic objectives’⁷¹.

There is no specific definition of the term ‘decent work’ because it is actually an enumeration of elements that people expect or should expect in their working career. The ILO attributed five characteristics to decent work being⁷²:

- It is productive and secure work;
- It ensures respect of labour rights;
- It provides an adequate income;
- It offers social protection; and
- It includes social dialogue, union freedom, collective bargaining and participation.

The fact that decent work is actually quite a vague term, lacking a clear definition, constitutes a great challenge for the ILO on how to monitor the progress towards decent work. In the ILO Declaration on Social Justice for a Fair Globalization⁷³, the ILO therefore recommended that member States may consider ‘the establishment of appropriate indicators or statistics, if necessary with the assistance of the ILO, to monitor and evaluate progress made’. Furthermore, the promotion of decent work could include a range of measures such as monitoring of labour standards, creating employment in countries of origin, combating illegal employment in destination countries and improving migration management.⁷⁴

3.3.2 Extreme exploitation

Decent work and forced labour exploitation are each other’s complete opposites but although decent work is somehow summarized using the five fore mentioned characteristics which gives it some clearance, such a description lacks for the term ‘exploitation’⁷⁵. For example: in the anti-trafficking framework forced labour is a form of exploitation. On the other hand forced labour is seen as the extreme form of exploitation compared to ‘lesser’ forms. This can be confusing and again, lead to the fore mentioned hierarchy of suffering.

⁷¹ As found on <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm> [accessed 28 April 2012]

⁷² Klara Skrivankova, *Between decent work and forced labour: examining the continuum of exploitation*, Joseph Rowntree Foundation 2010, p. 17

⁷³ ILO Declaration on Social Justice for a Fair Globalization, International Labour Conference, Geneva, 10 June 2008

⁷⁴ ILO, *Human Trafficking and Forced Labour Exploitation: guidance for legislation and law enforcement*, Geneva: ILO 2005, p. 5

⁷⁵ Klara Skrivankova, *Between decent work and forced labour: examining the continuum of exploitation*, Joseph Rowntree Foundation 2010, p. 17

4 Different fields of law

In this chapter I will describe the different fields of law that combat trafficking and forced labour exploitation in the EU in general and the UK in specific. The fields discussed are: criminal law, labour law and human rights law.

4.1 Criminal law

On 19 July 2002 the Council Framework Decision on Combatting THB⁷⁶ was adopted. It sought to contribute to the fight against THB by promoting a common approach to trafficking. One of the obligations in this Framework Decision was that all EU Member States needed to harmonise their domestic criminal legislation on trafficking by 2004. The European Commission however, concluded that the Framework Decision had significant shortcomings such as the low number of criminal proceedings, the lack of assistance, protection and/or compensation for victims and insufficient monitoring of the situation.⁷⁷

When after a couple of years the Commission noticed that the focus on the Framework Decision was too limited, they issued a proposal to withdraw it and modify it with better prevention of secondary victimisation and higher standards for victim assistance. The Lisbon Treaty, which entered into force on 13 December 2009, abolished the use of framework decisions so the modification and replacement of Framework Decision 2002/629 was accomplished by adopting the 2011 “Directive on preventing and combating trafficking in human beings and protecting its victims”⁷⁸ (hereinafter the Directive). The new Directive applies to all Member States except Denmark and the United Kingdom, making them not bounded by or subject to the application of the Directive⁷⁹.

The aim of the directive is to ‘establish minimum rules concerning the definition of criminal offences and sanctions in the area of trafficking in human beings.’ It also aims to ‘introduce common provisions of the crime and the protection of its victims.’⁸⁰ Article 2 of the Directive stipulates the new definition which differs from the definition in the old Framework Decision by means that the exploitation now also includes begging and the removal of organs, and that an open formulation of force is used.⁸¹ Furthermore, the Directive introduces three new legal elements: first, victim assistance and support by creating the obligation for member states to set up mechanisms to identify, assist and support victims in an earlier stage (article 11, paragraph 4 Directive). Also important in this regard is article 11, paragraph 3 Directive that stipulates that the victims’

⁷⁶ Council of the European Union, *Council Framework Decision 2002/629/JHA of 19 July 2002 on Combating Trafficking in Human Beings*, 19 July 2002, available at: http://ec.europa.eu/anti-trafficking/download.action;jsessionid=Hyc4P1dfhL4NmygtZjJ146TsSK21sxpVtv5kQwnJ2zNfsDtNRWtC!-1664183480?nodeId=c4c964df-1bf7-428e-8b7c-b3a0c84872f9&fileName=Framework+Decision+2002_629+on+combating+trafficking_en.pdf&fileType=pdf

⁷⁷ C. Rijken, ‘*the EU legal framework on combating THB for labour exploitation*’, in Conny Rijken (ed.), 2011: *Combating Trafficking in Human Beings for Labour Exploitation*, p. 357

⁷⁸ Council Directive 2011/36/EU repealing the Council Framework Decision 2002/629/JHA.

⁷⁹ Report on the proposal for a Directive of the European Parliament and of the Council on Preventing and Combating Trafficking in Human Beings, and Protecting Victims, Repealing Framework Decision 2002/629/JHA (COM(2010)0095 – C7-0087/2010 – 2010/0065(COD)), A7-0348/2010, Recital 21-23

⁸⁰ Report on the proposal for the new Directive, article 1

⁸¹ C. Rijken, ‘*the EU legal framework on combating THB for labour exploitation*’, in Conny Rijken (ed.), 2011: *Combating Trafficking in Human Beings for Labour Exploitation*, p. 359

willingness to cooperate in the criminal investigation is not a requirement for contingent support. Second, the protection of victims in criminal proceedings is enhanced in article 12 which, inter alia, stipulates that legal counselling and legal representation should be free of charge when the victim does not have sufficient financial resources (paragraph 2) and includes provisions for specific treatment to avoid secondary victimisation (paragraph 4). Thirdly, the new Directive includes provisions which try to tackle the demand side of THB.

In addition, article 8 of the Directive stipulates that member states should not prosecute or impose penalties upon victims of THB for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in article 2 of the Directive, which stipulates the offences concerning THB. Finally the Directive extends the grounds for jurisdiction, creates a new provision on compensation and obliges Member States to facilitate the tasks of an Anti-Trafficking Coordinator (ATC). The ATC will improve the coordination of the Union's strategy against THB (article 20 of the Directive) by collecting information provided by Member States' national rapporteurs or equivalent mechanisms (article 19 of the Directive).

4.1.1 Relevant UK criminal law

In the UK there are three separate pieces of legislation dealing with trafficking in human beings. However, only one is relevant regarding THB for labour exploitation and that is section 4 of the Asylum and Immigration Act 2004⁸². The other legislation mainly focusses on traffic in prostitution and trafficking for sexual exploitation. The Asylum and Immigration Act 2004 legislated against 'Trafficking people for exploitation' in general. This crime carries a maximum penalty, upon conviction on indictment, of fourteen years imprisonment. It is clear that the UK has chosen to identify 'trafficking' and its specified intent (prostitution or exploitation) as the main area of focus.⁸³

On 22 July 2004 the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 entered into force and on 1 December 2004 the offence of section 4, 'trafficking people for exploitation', came into force. The full text reads as follow:

'Under section 4 (1) a person commits an offence if he arranges or facilitates the arrival in or the entry into the United Kingdom of an individual, and;

- a) he intends to exploit the person in the UK or elsewhere, or*
- b) believes another person is likely to.*

Under section 4 (2) a person commits an offence if he arranges or facilitates travel within the UK of an individual in respect of whom he intends to exploit the person, or believes another person is likely to, whether in the UK or elsewhere.

Under section 4 (3) a person commits an offence if he arranges or facilitates the departure from the UK of an individual and he intends to exploit that person outside the UK, or believes another person is likely to, outside or the UK

Under section 4 (4) for the purposes of these offences, a person is exploited if he/she is:

⁸² Available on http://www.opsi.gov.uk/Acts/acts2004/ukpga_20040019_en_1#pb1-11g4

⁸³ Van Duyne & Spencer (eds), *'Flesh and money: trafficking in human beings'*, Wolf Legal Publishers, 2011, p. 213

- a) *The victim of behaviour contravening Article 4 of the ECHR (slavery or forced labour);*
- b) *Encouraged, required or expected to do something which would mean an offence is committed under the Human Organ Transplants Act 1989*
- c) *Subjected to force, threats or deception designed to induce him:*
 - i) *to provide services of any kind*
 - ii) *to provide another person with benefits of any kind, or*
 - iii) *to enable another person to acquire benefits of any kind; or*
- d) *a person uses or attempts to use him for any purpose within sub-paragraph i, ii or iii of paragraph c, having chosen him for that purpose on the grounds that:*
 - i) *he is mentally or physically ill or disabled, he is young or has a family relationship with a person; and*
 - ii) *a person without the illness, disability, youth or family relationship would be likely to refuse to be used for that purpose.'*

The fact that the criminal offence of trafficking is to be found in a provision in an asylum and immigration bill, suggests that the focus in the UK lies on the element of movement, rather than on the element of forced labour for establishing the crime of trafficking⁸⁴. The outcome of such a provision is that labour cases in which migrants are present are more often related to immigration than employment issues.

The UK is one of the few European countries that has a stand-alone criminal offence of forced labour. Since April 6th 2010 the criminal offence of holding another person in slavery or servitude or requiring them to perform forced or compulsory labour came into force and was filed in section 71 of the Coroners and Justice Act 2009⁸⁵. The full text reads as follows:

Section 71, subsection 1 provides that a person (D) commits an offence if:

- a) *D holds another person in slavery or servitude and the circumstances are such that D knows or ought to know that the person is so held, or;*
- b) *D requires another person to perform forced or compulsory labour and the circumstances are such that D knows or ought to know that the person is being required to perform such labour*

The circumstances must be that the defendant knows or ought to know that the person is being held in this fashion or required to perform such labour.⁸⁶ It is also important to note that subsection 2 of section 71 states that the reference to forced labour in section 1 should be construed in accordance with Article 4 of the ECHR. I believe that this section is a great step forward in combatting forced labour, and other States should follow the example of creating a stand-alone criminal offence of forced labour.

Since the entry into force of the Coroners and Justice Act 2009 there have not been many cases filed under this act. Searching the internet for possible cases, I found a recent case regarding section 71 of the Act 2009. This case is about two people who have been charged of trafficking of six Polish

⁸⁴ Anderson and Rogaly, *Forced labour and migration to the UK*, p. 8

⁸⁵ Klara Skrivankova, *Between decent work and forced labour: examining the continuum of exploitation*, Joseph Rowntree Foundation 2010, p. 15

⁸⁶ As found on: http://www.cps.gov.uk/legal/s_to_u/slavery_servitude_and_forced_or_compulsory_labour

nationals⁸⁷. The two suspects each face six counts of holding a person in slavery or servitude and are therefore jointly charged under Section 71 of the Coroners and Justice Act 2009 by means that they are suspected of taking control of the men's finances, accommodation and employment against their will. One of the two suspects is also accused of trafficking the six victims from Poland into the UK for exploitation. He is charged with six counts under sections four and five of the Asylum and Immigration Act 2004. Because of the fact that the two suspects were only arrested on 21 May 2012 the case is not yet decided upon, but it is a good development that the first charges regarding the 2009 Coroners and Justice Act are filed.

Finally, the Proceeds of Crime Act 2002 allows authorities to confiscate criminal assets of traffickers, among other.⁸⁸

4.1.2 Impunity of perpetrators in the UK

Skrivankova (2010) states that impunity is generally defined as exemption from punishment. With regard to her paper, impunity is also understood as the absence of punishment or accountability for actions by those who impose forced labour, exploit workers or commit the offence of human trafficking.⁸⁹ Perpetrators of THB are often not prosecuted because of the fact that the criminal offences stated in national laws are vague and/or too general or the State lacks resources for prosecution of perpetrators. Furthermore, the current understanding of trafficking is more based around borders and law enforcement, while it should be more based on employment and human rights issues. In that way the focus will be more on the perpetrators of trafficking for labour exploitation rather than on the illegal migrants. Another cause is that constitutional provisions are often not supported by specific laws.⁹⁰

Reasons why so few labour providers are convicted for the execution of forced labour are that forced labour is often prohibited through the labour code but not specified as a criminal offence and the fact that separate laws contradict with each other resulting in inconsistent definitions of overlapping offences.⁹¹ However, a state of awareness is created nowadays that effective action should include elements of different approaches and that trafficking is also a labour market problem, and therefore needs to be dealt with inter alia by labour institutions.

In the UK the prosecutors are encouraged to charge perpetrators with other offences besides trafficking, to give the Court a range of powers to reflect the criminality of the case and to make sure that the perpetrators are punished. The other offences that are commonly occurring when there is a case of trafficking are rape, kidnapping, false imprisonment, threats to kill or causing or inciting prostitution for gain⁹².

⁸⁷ As found on: <<http://www.portsmouth.co.uk/news/local/two-accused-in-human-trafficking-and-slavery-probe-1-3864762>> [accessed on 13 June 2012]

⁸⁸ House of Commons Home Affairs Committee, *The trade in human beings: human trafficking in the UK*, sixth report of session 2008-09, volume 1, 2009, p. 5

⁸⁹ Klara Skrivankova, *Between decent work and forced labour: examining the continuum of exploitation*, Joseph Rowntree Foundation 2010, p. 34

⁹⁰ ILO, *A Global Alliance Against Forced Labour: global report under the Follow-up to the ILO Declaration on Fundamental Principles and rights at Work 2005, Report I (B) International Labour Conference 93rd Session, Geneva 2005*, p. 20.

⁹¹ *Ibid.*, p. 20

⁹² As found on: <http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#a13> [accessed 15 May 2012]

Finally, more general reasons for the fact that perpetrators of both offences are often not prosecuted could be that there is overall very little known about their characteristics, such as nationality, age, gender education and qualifications and previous criminal behaviour⁹³ and that victims are often too scared to report their labour providers or traffickers. The restriction of movement of victims contributes to this phenomenon.

4.2 Labour law

Another field of law that is important when combatting trafficking and forced labour exploitation is labour law. Labour law defines the rights and obligations for workers, union members and employers in the working environment. In general, labour law covers industrial relations, workplace health and safety, and employment standards. In this paragraph I will mention relevant labour law from the ILO and relevant labour law in the UK.

4.2.1 The International Labour Organization

Besides the fore mentioned Conventions on forced labour, the ILO created other documents for the combat against THB and forced labour. In June 1998 the International Labour Conference adopted the Declaration on Fundamental Principles and Rights at Work and its Follow-up that obligates member States to, inter alia, eliminate all forms of forced or compulsory labour⁹⁴ (being one of the four ILO principles). However, the principles also apply to non-state actors such as business enterprises according to Guiding Principle 12 of the Interpretive Guide on the corporate responsibility to respect human rights.⁹⁵ Guiding principle 12 reads as follows: *“The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the (...) and the principles concerning fundamental rights set out in the ILO’s Declaration on Fundamental Principles and Rights at Work”*.

Responsible for the reporting processes and technical cooperation activities associated with the Declaration is the *InFocus Programme on Promoting the Declaration*. A way to do this are the Working Papers they publish⁹⁶. These papers are meant to stimulate discussion concerning issues raised, covered by the Declaration.

After the publication of the first Global Report on forced labour, the ILO Governing Body created a Special Action Programme to combat Forced Labour (SAP-FL)⁹⁷. The idea behind the SAP-FL was to further promote the 1998 Declaration.

Member States are required to report regularly on measures taken to implement the obligations that it has entered by ratifying an ILO convention⁹⁸. A Committee of Experts on the Application of

⁹³ Dowling et al., *Trafficking for the purpose of labour exploitation: a literature review*, Home Office Online Report 10/07, 2007, p. 8

⁹⁴ International Labour Organization (ILO), *ILO Declaration on Fundamental Principles and Rights at Work*, June 1988, available at: <<http://www.unhcr.org/refworld/docid/425bbdf72.html>> [accessed 9 May 2012]

⁹⁵ Interpretive Guide available at: <http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf>

⁹⁶ Ruwanpura and Rai, *Forced Labour: Definition, Indicators and Measurement*, International Labour Office working paper, Geneva, 2004

⁹⁷ As found on: http://www.nihrc.org/index.php?Itemid=14&id=9&option=com_content&task=view [accessed on 15 May 2012]

Conventions and Recommendations (Committee of Experts) examines the growing number of government reports on ratified conventions. This committee was set up in 1926 and is nowadays composed of 20 eminent jurists appointed by the Governing Body for three-year terms.⁹⁹ The Committee gives impartial and technical appraisal of a Member State's practice regarding the implantation of international labour standards.¹⁰⁰ Their comments are two-fold: observations and direct requests which they respectively publish in annual reports or use to obtain information or clarification on particular issues.¹⁰¹

In addition, the ILO drafted the Migrant Workers Convention 1975¹⁰², a convention which was followed up by the UN Convention on the Protection of All Migrant Workers and Members of Their Families¹⁰³ (1990) and the Convention No. 189 concerning Decent Work for Domestic Workers 2011¹⁰⁴, which sets labour standards for domestic workers.

4.2.2 Relevant UK labour law

In the UK there are several Acts that deal with labour law. A major document in this field is the Employment Rights Act 1996¹⁰⁵, which is a United Kingdom Act of Parliament to codify existing law on individual rights of workers and deals with rights that most employees can expect when they work. The problem with this Act is that it often does not cover vulnerable workers such as agency workers (people who work through employment agencies) and temporary workers. This means that this group of workers cannot rely on the rights given in the Act because these rights are only for 'employees'. An employee is defined in section 230 of the Employment Rights Act as somebody who has a 'contract of employment' and judges in the UK have decided that no such contract is established between agency workers and their (temporary) employers because of a lack of 'control' or 'mutuality of obligation'.¹⁰⁶ In other words, agency workers are not that strictly bound a job that the employer can carry out effective control over them. The lack of 'Mutuality of obligation' entails that a worker can, de facto, quite his job at any given moment.

To overcome the problem that people who work for employment agencies suffer from a lack of enforceable rights in the UK, the Agency Workers Regulation 2010¹⁰⁷ was created to give effect in UK law to the Temporary and Agency Workers Directive¹⁰⁸ adopted by the European Parliament and the European Council on the 19th of November 2008 and implemented in UK law. The Agency Workers

⁹⁸ ILO, *Forced Labour and Human Trafficking: Casebook of Court Decision*, International Labour Organization, Geneva: ILO 2004, p. 2

⁹⁹ As found on: <<http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm>> [accessed May 17 2012]

¹⁰⁰ ILO, *Forced Labour and Human Trafficking: Casebook of Court Decision*, International Labour Organization, Geneva: ILO 2004, p. 2

¹⁰¹ *Ibid.*

¹⁰² ILO Convention No. 143 (1975), available at:

<http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312288>

¹⁰³ UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158, available at:

<<http://www.unhcr.org/refworld/docid/3ae6b3980.html>> [accessed 14 June 2012]

¹⁰⁴ ILO Convention No. 189 (2011), available at: <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_157836.pdf>

¹⁰⁵ Employment Rights Act 1996, 1996 Chapter 18, 22nd May 1996

¹⁰⁶ *O'Kelly v Trusthouse Forte plc* [1983] ICR 728

¹⁰⁷ Agency Workers Regulation 2010, Statutory instruments, 2010 No. 93, 1st October 2011

¹⁰⁸ Council Directive 2008/104/EC

Regulations requires employers to treat agency workers and permanent staff equally in their contract on terms of pay, the duration of working time, night work, rest periods, rest breaks and annual leave (section 6(1) Agency Workers Regulations 2010).

4.2.3 Accessibility to the rights given

According to regulation 18 paragraph 2 Agency Workers Regulations 2010, ‘an agency worker may present a complaint to an Employment Tribunal that a temporary work agency or the hirer has infringed a right conferred on the agency worker by regulation 5, 12, 13 or 17 (2) of the Agency Workers Regulations’. Employment Tribunals deal with legal disputes in the workplace. Although an Employment Tribunal hearing is less formal than a court hearing, the decisions it takes are legally binding and must be followed.¹⁰⁹ An Employment Tribunal can only decide on a dispute of a specific right such as, amongst many others¹¹⁰, unfair dismissal, breach of contract, equal pay and appeal against an unlawful act on a notice issued by the Equality and Human Rights Commission (EHRC).

4.3 Human rights law

The EU

The European Union has a significant history in the field of combating forced labour and THB. An important article in this field is article 5 of the Charter of Fundamental Rights of the European Union, a document that was intended to emphasise the importance of fundamental rights and to make those rights visible to the Union’s citizens. Article 5 states:

Prohibition of slavery and forced labour:

1. *No one shall be held in slavery or servitude.*
2. *No one shall be required to perform forced labour or compulsory labour*
3. *Trafficking in human beings is prohibited.*

This article 5 was actually one of the few provisions that contained an update to the ECHR on which the Charter was fundamentally based. The European Union created a special agency that helps to ensure that fundamental rights of people living in the EU are protected. This agency is called the Fundamental Right Agency (FRA) and the their task is to collect evidence about the present situation of fundamental rights across the EU and use that evidence to give advice on how to improve the situation.¹¹¹ THB was mainly dealt with under Title VI of the Treaty of the European Union (TEU). An example of a measure taken by the EU is the Convention on the Establishment of the European Police Office, or Europol Convention¹¹². Article 1 (2) of this Convention stated that Europol had to take point in preventing and combating ‘illegal immigrant smuggling and trade in human beings’. Another measurement adopted by the EU was the Joint Action of 29 November 1996 which

¹⁰⁹ As found on:

<http://www.direct.gov.uk/en/Employment/ResolvingWorkplaceDisputes/Employmenttribunals/DG_10028122? [accessed 12 June 2012]

¹¹⁰ Full list available on: <<http://www.justice.gov.uk/tribunals/employment/claims/jurisdiction>>

¹¹¹ As found on: <http://fra.europa.eu/fraWebsite/about_fra/about_fra_en.htm>

¹¹² Council of the European Union, *Convention C 316 on the Establishment of the European Police Office of 27 November 1995*, 27 November 1995, available at: <[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41995A1127\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41995A1127(01):EN:HTML)>

established an incentive and exchange programme for persons responsible for combating THB and the sexual exploitation of children, also known as the STOP Programme¹¹³. Furthermore the Joint Action of 24 February 1997¹¹⁴ is important because it required Member States to review their relevant national law and make THB for sexual exploitation a criminal offence. In addition, police and judicial cooperation and coordination within and amongst Member States became important, as well as the protection of victims of THB.¹¹⁵ Finally, there was another project that touched upon THB, namely the European Commission *Daphne Initiative 1997-1999*. This project was initiated in response to the growing instances of violence against children, young persons and women.¹¹⁶ Looking at these earlier EU measurements, it becomes clear that cooperation between Member States regarding law enforcement and judicial agencies was the main goal of the EU back then, and is still nowadays.¹¹⁷

The most recent initiative of the EU regarding the combat against THB is the “EU Strategy towards the Eradication of Trafficking in Human Beings” which was adopted by the European Commission on 19 June 2012. In particular the Commission focusses on concrete actions that will support and complement the implementation of EU legislation on trafficking in human beings, in particular the Directive 2011/36/EU. The aim of the Strategy is to implement a set of measures over the next five years. The five key priorities are:

1. Better identifying and protecting victims;
2. Increasing prosecution of traffickers;
3. Development of child protection systems;
4. Setting up national law-enforcement units on human trafficking; and
5. The creation of Joint investigation teams including national authorities and EU agencies.

Council of Europe Convention on Action against THB

In the Explanatory Report of the Convention on Action against THB, it is stated that the main added value of this Convention is its human rights perspective and its focus on victim protection regarding THB, because THB is directly undermining everything the Council stands for. The Council of Europe is a pan-European organisation which, inter alia, brings together countries of origin, transit and destination of the victims of trafficking.¹¹⁸ The Council of Europe has adopted several initiatives in the last decades to raise awareness and encourage action in the field of THB. A good example is *Recommendation No. R(2000)11 of the Committee of Ministers to member states on action against trafficking in human beings for the purpose of sexual exploitation*.

¹¹³ Obokata in Guild & Minderhoud, *Immigration and Criminal Law in the European Union: The legal measures and social consequences of criminal law in member states on trafficking and smuggling in human beings*, Martinus Nijhoff Publishers, Leiden: 2006, p. 389

¹¹⁴ Joint Action 97/154/JHA of 24 February 1997

¹¹⁵ Obokata in Guild & Minderhoud, *Immigration and Criminal Law in the European Union: The legal measures and social consequences of criminal law in member states on trafficking and smuggling in human beings*, Martinus Nijhoff Publishers, Leiden: 2006, p. 389

¹¹⁶ European Commission, *The Daphne Initiative 1997-1999: overview and External Evaluator's Report of the 1998 Initiative* (2001), p. 6

¹¹⁷ Obokata in Guild & Minderhoud, *Immigration and Criminal Law in the European Union: The legal measures and social consequences of criminal law in member states on trafficking and smuggling in human beings*, Martinus Nijhoff Publishers, Leiden: 2006, p. 390

¹¹⁸ As found on: <http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Convntn/FSCConv_en.asp#TopOfPage> [accessed 18 May 2012]

The moral behind the draft of the Convention on Action against THB was to come up with a legally binding instrument which goes further than recommendations or actions. The Convention was opened for signature on 16 May 2005 and finally entered into force on 1 February 2008. The Convention consists of three major elements:

- 1) Protection of victims of THB and the safeguard of their rights;
- 2) Prevention of trafficking and prosecution of traffickers; and
- 3) Setting up of an effective and independent monitoring mechanism to control the implementation by Member States.

The Council of Europe Convention is a comprehensive treaty aiming to 3 P's: Prevent trafficking, Protect the human rights of victims of trafficking, Prosecute the traffickers. These 3 P's are stipulated in article 1 of the Convention. The Convention is based on the principle that trafficking constitutes a violation of human rights and an offence to the dignity and integrity of the human being.¹¹⁹ Article 5 is important in this regard while it creates an obligation for each Party to the Convention to promote a human rights-based approach in the development, implementation and assessment of the policies and programmes to prevent THB.¹²⁰ Article 2 states the scope of the Convention: '...shall apply to all forms of trafficking in human beings, whether national or transnational, whether or not connected with organised crime'. This thus includes everything from national or transnational trafficking, women, men and children, to whatever form of exploitation (sexual, forced labour, etc.).¹²¹

The website of the Council of Europe indicates which measures the Convention provides for. I will mention them below:¹²²

- Awareness-raising for vulnerable persons is very important so they can identify a possible trafficked situation better themselves;
- Victims of trafficking must be recognized as victims and not as illegal immigrants or criminals;
- Victims must be assisted in every way possible with their reintegration in civil society;
- There will be better circumstances for victims once they decided to cooperate with the authorities. For example, the issue of a residence permit will be tackled once the victim has chosen to cooperate in a criminal investigation against perpetrators;
- Trafficking will be a criminal offence;
- The privacy and safety of victims will be guaranteed;
- 'Second hand' perpetrators, people who use services of a victim when they ought to know that the victim was trafficked, can be prosecuted; and
- Civil society should play a bigger role in identifying trafficking through better co-operation between public authorities, NGOs and civilians.

Responsible for the monitoring of the implementation of the Convention by its parties is the Group of Experts on Action against Trafficking in Human Beings (GRETA). They publish reports evaluating the measures taken by the Parties.¹²³

¹¹⁹ *Ibid.*

¹²⁰ GRETA, *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Slovak Republic*, Strasbourg, 19 September 2011, p. 13

¹²¹ As found on: <http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Convntn/FSConv_en.asp#TopOfPage> [accessed 18 May 2012]

¹²² *Ibid.* [accessed 13 June 2012]

The UK

In 1998 the UK government passed an Act of Parliament known as the Human Rights Act 1998. Although passed in 1998, the Human Rights Act (HRA) did not come fully into effect until 2 October 2000¹²⁴. The HRA makes the ECHR part of law in all parts of the UK. The introductory text clearly states the aim of the HRA: ‘an act to give further effect to rights and freedoms under the ECHR; to make provision with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purposes’. The ECHR was drawn up in 1950, and since 1966 people from the UK have been able to take cases to the European Court of Human Rights alleging that the UK government has failed to uphold their human rights obligation. But with the HRA, the ECHR is also binding at national level, which makes it easier for UK foreigners to complain in their local courts about a violation of the Convention.

Other institutions for enhancing human rights are the Equal Opportunity and Human Rights Commissions. The strength of these commissions lies in the fact that they can start an investigation without requiring the complaint of a victim. A commission can react to a report by an UN agency by investigating it further.¹²⁵ Another advantage of the investigations by such commissions is that they often have more possibilities with regard to the scope of their investigation. So it is possible that they investigate State bodies, something civil courts mostly cannot do.¹²⁶ Regarding the UK, the decisions of the Human Rights and Equal Opportunity Commission have force in law, while in other countries the investigations create awareness and public pressure.

¹²³ As found on: <http://www.coe.int/t/dghl/monitoring/trafficking/docs/monitoring/greta_EN.asp>

¹²⁵ ILO, *Human Trafficking and Forced Labour Exploitation: guidance for legislation and law enforcement*, Geneva: ILO 2005, p. 54

¹²⁶ *Ibid.*, p. 54.

5 Gangmaster Licensing Authority

In this chapter I will discuss the Gangmaster Licensing Authority. I will start with a general introduction on the topic and then I will discuss its effectiveness. Finally, I will see if this fairly new agency is an example to be followed or not.

5.1 The role of the Gangmaster Licensing Authority

The Gangmaster Licensing Authority (GLA) is an agency in the United Kingdom which is set up to protect all workers from exploitation in agriculture, horticulture (plant cultivation), shellfish gathering and food processing and packaging. A worker is defined as any individual working in the industries mentioned above, including workers that not have the right to be or to work in the UK. This is particular important because the latter group is often considered to be the most vulnerable. According to the GLA's mission statement they try to 'safeguard the welfare and interests of workers whilst ensuring Labour Provisions within the law'.¹²⁷ The GLA finds his legitimacy in article 1 of the Gangmaster Licensing Act 2004.¹²⁸

The death of several young Chinese workers in the UK on February the 5th 2004 created the awareness that such an agency was needed to control the 'gangmasters'. The awareness that this tragedy created, resulted in a response of the Ethical Trading Initiative¹²⁹, who, together with the UK government, set up the Temporary Labour Working Group, a group of major retailers, growers, suppliers, labour providers and trade unions, to establish a set of minimum standard for labour providers and gangmasters. The lobbying of this Group partially resulted in enactment of the Gangmaster (Licensing) Act.

The website of the GLA sets out several concrete actions by which they believe the above mentioned mission statement is reached.¹³⁰ In general they introduce and operate a system to license labour providers, which will be accessible through a publicly register. The legal requirement for labour providers to be licensed will be made well-known through adequate communication. They will also try to minimize the burden for such labour providers through efficient and effective processes and procedures. Furthermore, they will develop and promote standards for best practices when it comes to the use of temporary labour. Of course the licensed gangmasters will be checked upon compliance with their duties. Another instrument they use is taking enforcement actions against illegal and other unlicensed operators. Connected with this is the support they will give to law enforcement by sharing information and joint working. Finally, they try to stay critical on their own activities and the effectiveness of their actions.

A gangmaster is defined as anyone employing, supplying or supervising a worker employed in one of the industries the GLA is regulating.¹³¹ The dead of the Chinese migrant workers, together with the findings of a Parliamentary Select Committee that a voluntary registration system would be

¹²⁷ Mission statement found on: <<http://gla.defra.gov.uk/Who-We-Are/Mission-Statement/>> [accessed 22 May 2012]

¹²⁸ Gangmasters (Licensing) Act 2004 (Commencement No. 3) Order 2006.

¹²⁹ As found on: <http://www.ilo.org/dyn/migpractice/migmain.showPractice?p_lang=en&p_practice_id=51> [accessed 13 June 2012]

¹³⁰ As found on: <<http://gla.defra.gov.uk/Who-We-Are/Mission-Statement/>>

¹³¹ As found on: <http://www.ilo.org/dyn/migpractice/migmain.showPractice?p_lang=en&p_practice_id=51>

ineffective, stimulated the quick adaptation of the Gangmaster (Licensing) Act¹³² and the creation of an authority to issue licenses and ensure compliance through inspections. The GLA was set up to specifically protect workers and drive out illegal practices and exploitation in the food production industry such as worker exploitation and business fraud.

The GLA is a Non Departmental Public Body with a board of 30 members from industry and government which grants licenses to businesses in the above mentioned sectors to make sure the employment standards required by law are met. Labour providers need to check if they meet the GLA licensing standards which cover health and safety, accommodation, pay, transport and training¹³³. When a labour provider does not have a GLA license when working in one of the regulated sectors, he is committing a criminal offence. These offences are clearly stated in articles 12, 13 and 14 of the Gangmaster (Licensing) Act. Article 12 provides for offences such as acting as a gangmaster without a license and possessing false documents. Article 13 criminalizes the entering into arrangements with a gangmaster who is in violation of article 6 Gangmaster Act (article 6 stipulates the prohibition of unlicensed activities). Finally, article 14 provides for some procedural provisions such as the power of enforcement officers. These enforcement officers may arrest anyone who is about to commit an offence as mentioned above and anyone who is suspected to commit such an offence in the near future or in case that an offence has already occurred, the person who is suspected (on reasonable grounds) to be guilty of the offence.

In their report of 2007¹³⁴ the TUC Commission on Vulnerable Employment made some statements and recommendations regarding the GLA and their possible help for the vulnerable workers in the UK. First of all the TUC Commission stated that the GLA is one of the few agencies that made a good start enforcing specific employment rights. On the other hand they recommend that the UK Government should extend the GLA licensing regime to others sectors that are also characterised by vulnerable employment such as the construction and hospitality sectors because the GLA has shown that they can help enforcing labour standards.

5.2 Effectiveness

A good source of information on the efficiency and general success of licensing as a tool to combat worker exploitation and business fraud and of the GLA as a regulatory body, are the GLA Evaluation Reviews. These reviews are carried out by the Universities of Sheffield and Liverpool which independently assess the effectiveness of the Authority.

In the first Annual Review of 2007 it is stated that the GLA has licensed over 1100 labour providers and covers an estimated 7000 labour users.¹³⁵ According to the report, the labour providers welcomed the GLA and felt that licensing had had a positive impact on the UK food industry. An interesting outcome of the labour provider survey, which was issued to identify key industry characteristics, showed that in terms of GLA enforcement, there was a strong feeling that

¹³² ILO, A Global Alliance Against Forced Labour: global report under the Follow-up to the ILO Declaration on Fundamental Principles and rights at Work 2005, Report I (B) International Labour Conference 93rd Session, Geneva 2005, p. 23.

¹³³ As found on <http://gla.defra.gov.uk/Who-We-Are/What-We-Do>, 28th april 2012

¹³⁴ TUC Commission on Vulnerable Employment, *Hard Work, Hidden Lives: the full report of the Commission on vulnerable employment*, available on: <http://www.vulnerableworkers.org.uk/files/CoVE_full_report.pdf>

¹³⁵ GLA, *Annual Review: Executive Summary*, Gangmaster Licensing Authority 2007, Nottingham: 2007, p. 4

perpetrators still did not get caught.¹³⁶ This is said for the continued presence of unlicensed operators and the double standards of pretended reputable companies. The aforementioned survey also shows that after only 12 months into licensing, 40% of labour providers felt that the GLA had reduced business fraud, and that 45% felt that the GLA had improved working conditions.¹³⁷ On the other hand, 94% of the gangmasters did believe that worker exploitation was still an issue in their sectors.

Meanwhile, labour users indicate that the operating conditions were tough and that profit margins had tightened over recent years.¹³⁸ They pointed out some concerns and key strengths of GLA licensing.¹³⁹ A summary:

Concerns:

- Continued presence of small-scale unlicensed operators;
- Illegal activities by some ostensibly legitimate licensed gangmasters, sometimes connected to broader organised crime;
- Problems of getting evidence from labour users and agency workers;
- The need for more unannounced compliance/enforcement visits; and
- The need for quicker condemnation by multiples (such as supermarkets) of illegal labour providers and gangmasters. E.g. supermarkets would only de-list an illegal supplier when they are assured of alternatives instead of de-listing suppliers immediately.

Key strengths:

- Labour supply is not chaotic and disorganised anymore now there is a framework to rely on;
- Gangmasters have formalised in-line with the broader UK food industry;
- The number of rogue operators has declined since licensing; and
- The GLA has provided very good guidance/advice.

The 2008 Annual Review¹⁴⁰ aimed to assess the impact of GLA Licensing in relation to whether or not it has helped to reduce worker exploitation since it moved to Phase 2 of its activity. The Review deals with the changes on an economic, political and organisational level.¹⁴¹ Important developments were that there was a rise in number of full licensed gangmasters, and a rise in gangmasters that have left GLA-governed sectors.¹⁴² A bad development was the fact that there was consistency in the nature of gangmasters' non-compliance in the field of health and safety; proper payment wages, tax and national insurance; and recruitment and contract practices.¹⁴³

Another significantly important figure in the 2008 Annual Review is Figure 5 on page 18.¹⁴⁴ This figure shows that GLA licensing has slightly improved conditions for workers, slightly decreased the number

¹³⁶ *Ibid.*, p. 7

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ GLA, *Annual Review: Executive Summary*, Gangmaster Licensing Authority 2007, Nottingham: 2007, p. 8 & 9

¹⁴⁰ GLA, *Annual Review 2008: Executive Summary*, Gangmaster Licensing Authority, Nottingham: 2009

¹⁴¹ *Ibid.*, p. 12

¹⁴² GLA, *Annual Review 2008: Executive Summary*, Gangmaster Licensing Authority, Nottingham: 2009, figure 1

¹⁴³ *Ibid.*, p. 14

¹⁴⁴ As found on: <<http://gla.defra.gov.uk/PageFiles/922/ExecSummaryFinal.pdf>>, p. 18

of unlicensed labour providers, and slightly reduced fraud and/or illegal activity on the one hand while on the other hand it reduced profit margins and increased operating costs.

The positive impact of the GLA practice is that it helps to ensure that temporary migrant workers and other vulnerable workers have minimum standards of terms and conditions of employment. These minimum conditions can be controlled and enforced. Regarding its effectiveness one can state that the Licensing Act 2004 successfully implements a licensing system for labour providers that helps to regulate the businesses in which vulnerable (migrant) workers operate. The Gangmaster Licensing Authority helps to ensure that the regulations are lived up to and offers a mechanism for inspection, which is proven to be an appropriate tool to regulate recruiters.

A recent report of the Association of Labour Providers (ALP)¹⁴⁵ shows that the ALP acknowledges great improvement in labour supply standards within the food and agricultural sectors, and confirms that the GLA is a major reason for this. This report proves to be very useful when examining the effectiveness of the GLA while it, inter alia, consist of the views of labour providers on the GLA, which I will mention below:

- 71 % of the labour providers are in favour of licensing;
- 61 % of the labour providers states that the GLA had improved conditions for workers; and
- 69 % of the labour providers said that the GLA had reduced fraud/illegal activity

Looking at these positive percentages it is remarkable to notice that only 49 % of the questioned people felt that the GLA was doing a good job.

One of the major challenges the GLA faces is the difficulty in communicating with workers. People who are exploited or are being exploited are often very scared to denounce their situation. This could be because they are afraid of their employers or gangmasters. The employers threaten them with physical punishment or with returning them to the country of origin. Another reason for the lack of communication is the simple fact that workers feel that they could lose their jobs when they speak up.

For me it is clear that the GLA is quite effective but that they face several challenges which they cannot deal with on their own. A better cooperation with other UK institutions is needed in the fields of communication with victims for the purpose of evidence, so that they can assist law enforcers with prosecutions of perpetrators. Furthermore, I believe the GLA needs to grow in numbers to keep carrying out the unannounced visits to labour providers. Finally, it is my opinion that the effectiveness of the GLA, calculated in numbers of protected workers, could be enhanced when they expand the types of sectors they regulate.

5.3 An example to be followed?

I believe that the creation of the Gangmaster (Licensing) Act and the Gangmaster Licensing Authority are indeed examples to be followed. This should be followed not only in the UK, but perhaps even at

¹⁴⁵ ALP, *Future Focus of the Gangmasters Licensing Authority*, policy paper, January 2012 as found on: <<http://www.labourproviders.org.uk/files/ALP%20paper%20-%20Future%20Focus%20of%20the%20GLA%20-%20January%202012.pdf>>

European level. I think it is safe to say that it would be a good practice to extend the GLA-style licensing to all labour providers, for starters, within the UK. The effectiveness of the GLA in the sectors they regulate is shown above. With a little help from the government they could overcome the challenges that lie ahead. Other vulnerable sectors such as construction, health care and cleaning could therefore also be protected when a license is required.

On a European scale it is of course harder to implement such a licensing authority because of the immense geographical area that needs to be covered. On the other hand I don't think that it is impossible. If such an agency would be created, I would picture it as centrally arranged and controlled agency under the auspice of the European Union, but executed at a regional (national) level. Agencies are created 'to fulfil the request for geographical devolution and the need to cope with new legal tasks' and are set up to accomplish very specific tasks.¹⁴⁶

Every Member State should have its own licensing authority, comparable with the GLA in the UK, operating under a general European licensing act, comparable with the Gangmaster (Licensing) Act in the UK. In this way the EU will benefit from the positive effect that the licensing practise creates in the UK and in addition the EU creates an enormous database of legal and illegal labour providers, making it easier to act if a labour provider/gangmaster and/or criminal group starts, for example, a new illegal business in another country. This could be a very plausible option regarding the EU's basic principles of free movement of people, goods and services.

The EU Treaty does not provide for a specific legal basis to create an agency but this has not prevented the delegation of powers to autonomous agencies.¹⁴⁷ A lot of existing agencies have the same legal basis, being article 308 EC Treaty which states:

'if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures'

With the entering into force of the Lisbon Treaty, article 308 became article 352 which is now the legal basis for agencies and is called the "flexibility clause".

We can distinct two types of agencies: executive and regulatory agencies. Executive agencies are Community public bodies that are responsible for the management of Community programmes. They are created to perform the tasks of implementing and managing Community programmes.¹⁴⁸ Regulatory agencies operate in a wide variety of fields and are actively involved in the regulation of a specific sector.¹⁴⁹ This makes the latter type more suitable for a 'European GLA'. The agency I have in mind should furthermore be an agency in the 'executive model' category. This category is composed of agencies who are in charge of operational activities and are established in accordance with Council Regulation (EC) No 58/2003 (OJ L 11, 16.1.2003)¹⁵⁰. Examples of these agencies are EUROJUST and

¹⁴⁶ As found on <http://europa.eu/agencies/regulatory_agencies_bodies/index_en.htm>

¹⁴⁷ Andoura & Timmerman, 'Governance of the EU: The reform debate on European Agencies Reignited', Working paper No. 19, October 2008, p. 7, available at: <<http://www.ceps.eu/files/book/1736.pdf>>

¹⁴⁸ *Ibid.*, p. 8

¹⁴⁹ *Ibid.*, p. 9

¹⁵⁰ Available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:011:0001:0008:EN:PDF>>

FRONTEX.¹⁵¹ There are however several issues regarding the creation of an agency with regard to the legitimacy and accountability of their actions.¹⁵² It will take too long to go very deep into the matter of agencies right now but I believe it is sufficient to state that agencies are a useful instrument in the EU because of their expertise on a specific subject and the flexibility they bring to the EU governance. On the other hand it is not so easy to set up an agency because of the problematic aspects of legitimacy and accountability of the agencies actions, the diversity between different agencies in their relationship against decentralisation, subsidiarity and proportionality.

¹⁵¹ *Ibid.*, p. 10

¹⁵² *Ibid.*, p. 18

6 The situation in the United Kingdom

In this final chapter I will discuss the Courts in the UK that decide upon labour issues as well as an analyses on the scope of THB for labour exploitation in the UK. Finally, I will elaborate on the compensation for victims and present some relevant case law.

6.1 Setting up Labour Courts in the UK

In the UK there is no separate labour court system for dealing with all labour law issues. The UK has a system where the judicial determination in the field of labour law is divided between employment tribunals (former industrial tribunals) and the common courts.¹⁵³ The common courts are competent for labour cases based on the common law. There are, in first instance, the County Courts, with possibility of appeal to the Courts of Appeal and the Supreme Court.¹⁵⁴ Employment tribunals were created as Industrial Tribunals by the Industrial Training Act 1964, but changed name under the Employment Rights (Dispute Resolution) Act 1998. Their function however stayed the same as the Industrial Tribunals. Employment Tribunals are competent in all cases the law especially assign to them.¹⁵⁵ Employment tribunals hear cases involving disputes regarding employment which have not been dealt with by other means. These other means could be a formal conversation with the employer or trying to resolve the problem through employer's disciplinary process.¹⁵⁶ Practices show that these special tribunals have jurisdiction over most of the labour law issues.

6.2 THB for labour exploitation in the UK

In December 2005, the House of Lords' Joint Committee on Human Rights (JCHR) wanted to know from the UK government what is being done to tackle human trafficking. Admitting that most of the knowledge regarding trafficking was centred on trafficking for prostitution, the government issued the Home Office to conduct a research¹⁵⁷ to understand more about the nature and extent of trafficking for the purpose of labour exploitation. For the purpose of this thesis I will hereby mention the most important findings of the Home Office regarding adults.

An important issue is the fact that individuals are not always able to identify themselves as a victim of trafficking because they do not always experience the working conditions as 'forced' or 'involuntary'. Furthermore, practitioners struggle with the same problem because the Palermo Protocol states the definition of human trafficking but does not provide for a standardised guidance for the identification of victims. It is therefore suggested that the focus should be more on the exploitative working practices rather than on the pure trafficking, the illegal/legal routes of entry in

¹⁵³ As found on: <<http://www.eurofound.europa.eu/emire/UNITED%20KINGDOM/LABOURCOURT-EN.htm>> [accessed 18 May 2012]

¹⁵⁴ Jacobs, *Labour Law and the law in Europe: a satellite view on labour law and social security law in Europe*, Wolf Legal Publishers, Nijmegen: 2011, p. 65

¹⁵⁵ *Ibid.*

¹⁵⁶ As found on:

<http://www.direct.gov.uk/en/Employment/ResolvingWorkplaceDisputes/Employmenttribunals/DG_10028122>

¹⁵⁷ Dowling et al., *Trafficking for the purpose of labour exploitation: a literature review*, Home Office Online Report 10/07, 2007

the UK, practices.¹⁵⁸ As mentioned before in the part of the GLA, victims are found in a broad range of sectors such as construction, cleaning and domestic work. It is safe to say that the industries in which most victims operate are characterised by '3D' work: dangerous, difficult and dirty.¹⁵⁹ The identity of the perpetrators is not very clear but anecdotes suggest that traffickers might be members of the same nationality as the victims and/or use former victims to recruit new ones.¹⁶⁰ In addition, the research shows that victims are found in a wide variety of UK geographical areas, but mostly in areas where there is a high concentration of industries¹⁶¹. Also known is that the UK is mainly a destination country, although there are cases of internal trafficking known as well as cases of trafficking from the UK to North America.¹⁶²

6.3 Compensation of victims in the UK

Adults and children arrested by the police and charged with committing a crime might be the victim of THB. It is e.g. possible that trafficked victims get arrested when they are escaping from their trafficking and/or forced labour situation and commit a crime they need usually would not commit. In such cases the crimes they commit are often immigration offences such as using a false instrument (section 3 Forgery and Counterfeiting Act 1981), possession of a forged passport (section 5 Forgery and Counterfeiting Act 1981), possession of a false identity document (section 6 Identity Documents Act 2010) or failure to have a travel document at a leave or asylum interview (section 2 Asylum and Immigration Act 2004).¹⁶³

In the UK there is a single framework centred on victim identification and referral to appropriate support, called the National Referral Mechanism. First responders such as police, local authorities and NGOs can refer suspected victims of trafficking to a Competent Authority. In the UK there are two Competent Authorities being the UK Human Trafficking Centre (UKHTC) and the UK Border Agency. This authority then takes a decision within 48 hours.¹⁶⁴ The action a 'first responder' has to undertake is to complete a referral form recording their encounter with a potential victim. Depending on the given information a decision is taken whether the subject has 'reasonable grounds' for being treated as a victim of trafficking.¹⁶⁵

The UKHTC is home of a multi-agency Competent Authority led by the Serious Organised Crime Agency (SOCA). It functions as a central point of expertise and coordination in relation to the UK's response to THB.¹⁶⁶ The diversity in partners of the UKHTC shows that THB is to be combatted through a diverse set of programmes which prevent and reduce the harm caused by THB. Amongst the partners are police forces, the UK Border Agency, HM Revenue & Customs, the Crown Prosecution Service, the GLA, NGOs and charitable and voluntary expert groups.¹⁶⁷

¹⁵⁸ *Ibid.*, p. 7

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*, p. 8

¹⁶¹ *Ibid.*, p. 9

¹⁶² *Ibid.*

¹⁶³ *Ibid.* [accessed on 18 May 2012]

¹⁶⁴ As found on: http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#a23 [accessed on 30 May 2012]

¹⁶⁵ *Ibid.*

¹⁶⁶ As found on: <http://www.soca.gov.uk/about-soca/about-the-ukhtc> [accessed on 30 May 2012]

¹⁶⁷ *Ibid.*

The UK Border Agency is also an effective response to trafficking. Created in 2008, the Border Agency improves border security by bringing together customs, immigration and visa staff to form a single organisation. Furthermore, in 2013 the National Crime Agency will be created, including a new Border Policing Command. Expectations are that this will strengthen the ability to identify traffickers at the borders in the UK and overseas.¹⁶⁸

Other organisations dealing with victims are the Salvation Army, the Citizens Advice Bureau or the International Organisation for Migration. The Salvation Army does have a history with helping vulnerable people worldwide. Victims of THB are obviously a target for the Army. According to their website their specialist support programme aims to preserve the dignity of victims of THB, protect them and care for them in safe locations and assist them with legal advice and health care.¹⁶⁹ The other organisations who possibly can provide assistance are the Citizens Advice Bureau or International Organisation for Migration. The problem with these organisations however, is that victims need to actively approach them, but here the identification problem occurs again.

Finally, GRETA visited the UK from 24 to 28 October 2011. Among the officials they spoke were representatives of both the UKHTC and the UK Border Agency. Unfortunately the final GRETA report on the UK is not been made public at the time of writing.¹⁷⁰

6.4 Cases

The 2011 Trafficking in Persons Report of the UK¹⁷¹ states that the UK government improved its prosecution of forced labour offences but that the majority of the prosecutions and convictions are still related to sex trafficking. The Report recommends, inter alia, to train law enforcement and the legal community on the slavery-based approach of the 2009 Coroners and Justice Act and to examine sentencing structures to determine if they appropriately respond to labour trafficking situations.

Sometimes victims of exploitation are prosecuted for committing an offence, which of course creates an undesirable situation, especially when these victims are trafficked for the purpose of committing those crimes. In the judgement of *R v O* 2008¹⁷² the duty of the prosecutor in these cases is defined to be pro-active in causing enquiries about the suspect and the circumstances in which they were apprehended. The Court reaffirms the fact that the guidance on the prosecution of trafficked victims must be followed. This statement was further strengthened in the case *LM, MB, DG, Betti Tabot and Yutunde Tijani v The Queen*¹⁷³ in 2010. It is important that prosecutors give full attention to a wide range of factors (religion, captivity, psychological coercion) when they consider a defence of duress in law.

¹⁶⁸ HM Government, *Human Trafficking: the Government's Strategy*, 2011, p. 17

¹⁶⁹ <www.salvationarmy.org.uk/uki/trafficking>

¹⁷⁰ As found on: <http://www.coe.int/t/dghl/monitoring/trafficking/docs/news/UK_web_article_en.asp>

¹⁷¹ United States Department of State, *2011 Trafficking in Persons Report - United Kingdom*, 27 June 2011, available at: <<http://www.unhcr.org/refworld/docid/4e12ee3ac.html>> [accessed 14 June 2012]

¹⁷² *R v. O*, [2008] EWCA Crim 2835, United Kingdom: Court of Appeal (England and Wales), 2 September 2008, available at: <<http://www.unhcr.org/refworld/docid/49467d142.html>> [accessed 14 June 2012]

¹⁷³ *LM & Ors v R*. [2010] EWCA Crim 2327, United Kingdom: Court of Appeal, 21 October 2010, available at: <<http://www.bailii.org/ew/cases/EWCA/Crim/2010/2327.html>>

On 12 September 2011 Channel 4 News reported on the rescue of some 24 vulnerable people who were held captive in several sheds on a traveller's camp site in Leighton Buzzard, Bedfordshire, UK¹⁷⁴. One of the sheds, not larger than a gardeners house, was the home of at least four adult men, 'packed together like sardines'. The police found small sheds, broken caravans and other poor shelter where men lived in filthy conditions. The travellers who live on the property denied all accusations of slavery like practices, stating that the men could leave anytime they wanted. An important question was whether coercion was present or not, because nine of the rescued people immediately returned to their 'homes' and refused to cooperate with the investigation. The local police declared that in this type of situation the victims need full support from the law enforcers. Graham Clark, a victim, clarifies in an interview to Channel 4 News that he had to work from 06.00h until 19.00h every day, doing jobs he never had done before, such as working on a rooftop without any protection. Other problems he had to deal with were the lack of enough food and the prohibition to use a proper toilet. He was also underpaid as he only received 40 pounds for a 13 hour work day, which makes a salary of merely three pounds per hour. According to the UK National Minimum Wage¹⁷⁵ (NMW) rate, the minimum wage for a worker aged 21 was six pound eight. Finally, Graham ended up in homeless care. A Homelessness Project Manager argues that these sorts of situations are increasingly common.

It is of my opinion that this is a good case on which we can test everything I discussed previously in this thesis. I will determine whether there is a situation of forced labour or not, whether there is a case of THB or not and what could be an appropriate remedy for mister Clark in different situations, using the continuum of exploitation.

Forced labour

As mentioned before, 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'* and is presumed to be present when two or more of the indicators created by the ILO are present. Regarding the definition it is clear that the element of 'all work or service' is present. Clark had to perform manual labour on a roof, probably fixing or building it. Obviously this is not the exception of undergoing compulsory education. The 'any person' phrase is also not an objection while it means every person with no distinction between adults and children, sex and nationality.

The second element is probably harder to prove. The work must be exacted under 'the menace of a penalty'. This could be both criminal sanctions as well as different forms of coercion. The Committee of Experts stated that 'menace of a penalty' must be construed broadly and therefore the loss of rights and privileges could also be a possible situation of 'menace of a penalty'. Given the known facts, Clark was not threatened with violence or any other penal/physical sanction but his situation as a homeless guy addicted to liquor and in search for money could have resulted in a situation of psychological coercion, a form of coercion the ILO supervisory bodies decided to be a possible 'menace of a penalty', contrary to economic coercion. This particular case is in my opinion one of psychological coercion, given Clarks' homeless state and liquor addiction. When stating this I must admit that I interpret Clarks homeless situation as well as his liquor addiction not as problems on their own. One could argue that it is economic coercion and not psychological, because he just

¹⁷⁴ Available at: <<http://www.channel4.com/news/five-arrested-on-slavery-charges-at-travellers-site>>

¹⁷⁵ Available at:

<http://www.direct.gov.uk/en/Employment/Employees/TheNationalMinimumWage/DG_10027201>

needed the money for liquor and a place to stay but I tend to believe that being homeless and addicted for several years changes a man's psychological state of mind, making him more inclined to take the offer. Furthermore Clark explains that he was too scared to escape. He tried once but they found him and brought him back to the site. Furthermore, there is a situation of a penalty because the victim indicates he felt degraded as a human being because of his living conditions. Clark can therefore be considered a victim even when the penalty was not imposed on him directly (*Siliadian* judgement of the ECtHR). Given the above, for now I assume that the element of 'menace of a penalty' is present due to possible psychological coercion and the indirect 'Siliadian victimization'. This is however open for debate.

The third element for proving the existence of forced labour is the 'voluntarily' offer. When work is accepted under threat, there is no voluntarily offer. The same goes for the presence of deceit and fraud in the work offer. In this case there was no threat with violence or fraud but there is possibly a case of deceit. A manager of a homeless people care centre indicates that labour providers just enter a care centre and "lure" the vulnerable people with promises of a house and money, while in reality people have to live in a small caravan with four people and receive little pay. The only problem is that Clark in his statement does not specifically refer to such deceit. The two-fold question is the consent to work given freely and is the worker able to revoke his consent must, purely given the facts, be answered positively. But it seems that Clark gave his consent to work voluntarily by ways of deceit and only to find out later that he was not free to withdraw from the labour situation or that he could not withdraw his consent to work. Therefore Clark and/or his fellow victims did not voluntarily offer themselves, creating a situation of forced labour because all three elements of the definition are present.

When examining Clarks' case *solely* using the list of indicators provided by the ILO, one must recon that the violations point at a situation of exploitation, but that they are not severe enough to be a situation of forced labour. There is, given the facts, no threat of violence, no situation of debt bondage, no retention of identity documents, no (direct) restriction of movement and no threat of denunciation to the authorities. The only actual present indicator is the low pay. The excessive working hours are not an indicator mentioned by the ILO. The really bad housing situation and the fact that the people went back to that situation refusing to cooperate with the police is suspicious, but needs further investigation. Regarding the restriction of movement indicator, Clark did mention that he could not escape earlier because he really had no place to go. So by closely examining the definition one could say that there is a situation of forced labour but comparing Clarks situation just with the list of indicators, I believe this is not a case of forced labour. However, the ILO indicators are not exhaustive and situations must be thoroughly investigated using both the definition and the indicators. When doing so, I believe it is safe to say that Clark is a victim of forced labour.

Trafficking

So could there also be a situation of THB? For trafficking to be established the three elements of the Palermo definition (act, means and purpose) must be present. It seems like all three elements are present because Clark was recruited (act) by means of 'other terms of coercion' being the promise of proper housing and payment. Furthermore there is in this case the abuse of 'a position of vulnerability' while the recruited people were poor and homeless, another type of 'means'. Finally

the element of purpose is also present while the purpose is forced labour, which was established above. Given this quick check of the definition, I believe this is a situation of THB (situation 1).

Using the continuum

Now we have concluded both a forced labour situation and a situation of trafficking in human beings for labour exploitation, we can use the continuum of exploitation to seek remedies for Clark. In this case it is clear that Clark has a lot of options because of the presence of both a situation of forced labour and THB. When we take a look at the actual graphic (see page 45) of the continuum, we see that the forced labour situation is the negative extremity of decent work and that this falls in the sphere of mixed intervention. Regarding the stand alone offence of forced labour Clark could go to an Employment Tribunal and charge the men who he worked for, with violations of labour standards such as the low pay, the long hours and the unsecure working conditions. The men would then be prosecuted for failure to comply with labour law. The same men however, could also be prosecuted through criminal law for committing an offence of forced labour, in particular section 71 of the Coroners and Justice Act 2009. Regarding the situation of trafficking, remedies are provided for by criminal law.

Other situations

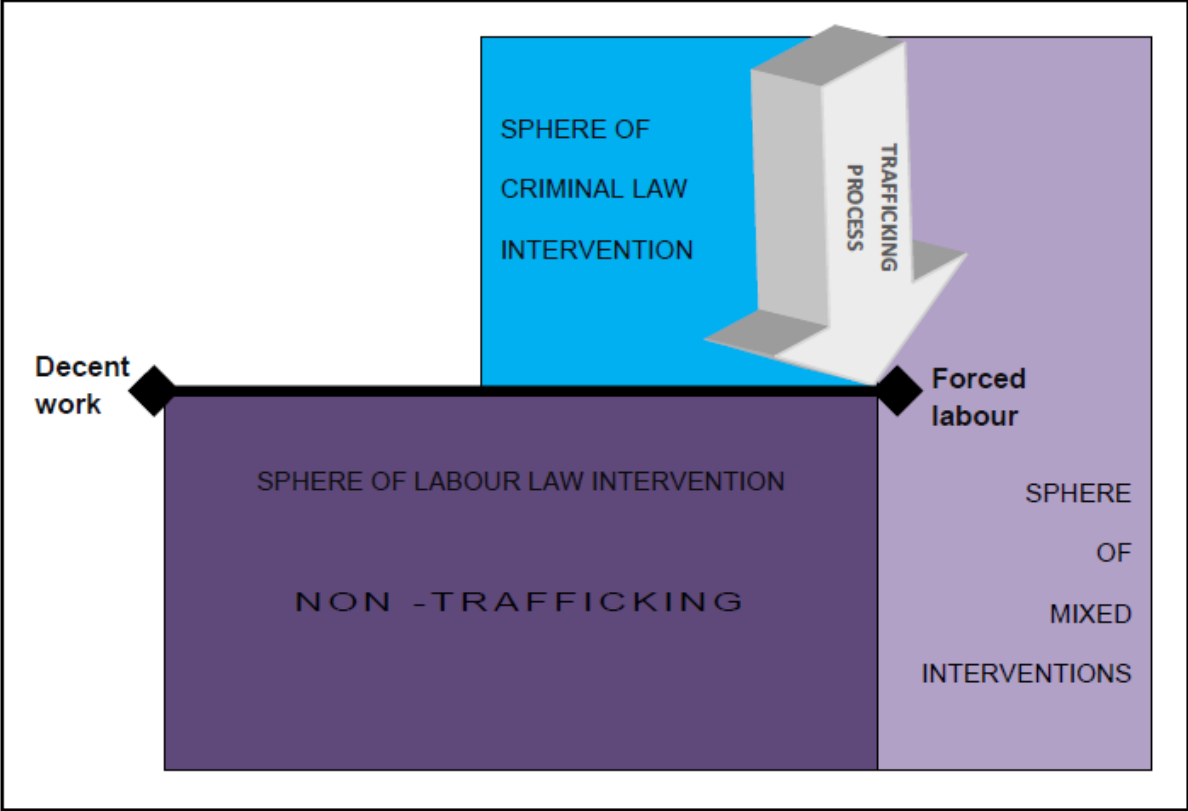
If we had decided that Clarks situation was not one of forced labour (situation 2) because it did not fulfil the element of ‘menace of a penalty’, the situation would be different but still the continuum could have helped identifying his situation and possible remedies. The violations he then suffered would be violations of labour standards, being the dangerous work, the excessive working hours and the unlawful low pay. The situation of Clark would be on the line, somewhere between decent work and forced labour, which still creates remedies through labour law.

Is there a case of THB in this (created) second situation? The first two elements of the definition, act and means, are still met, for the same reasons as in situation one. The question is whether there is a purpose of exploitation or a situation where the purpose hasn’t occurred yet but it is clear that the purpose is exploitation. As mentioned in chapter two of this thesis, trafficking will occur ‘if the implicated individual or entity intended that the action would lead to one of the specified end results.’ Given the facts (entering a shelter for homeless people, promising proper housing and payment) I believe that there is no direct purpose of exploitation according to article 3 (a) of the Palermo Protocol, but that the intention of exploitation is present. Otherwise the labour providers would have hired normal workers. Assuming this, all three elements of trafficking are present, establishing a trafficking situation. This would give Clark, looking at the graphic of the continuum and besides the remedies through labour law because of the non-compliance with labour standards, a remedy through criminal law.

Examining this case learns us a lot about the actual question of this thesis. States should separately criminalize forced labour and trafficking in human beings. If the State Clark lives in only criminalized forced labour as an outcome of trafficking, but trafficking could not be proved, he would not have a case in the first situation. If his country only criminalized trafficking in human beings for forced labour he would not had a case in the second situation. And finally, if his country did not have a separate criminal provision against forced labour, but solely against THB, the impunity of the perpetrators would be larger in situation 1, because no criminal procedure could be started against

them. Therefore I think it is safe to say that separate (criminal) provisions enhance the prosecution and/or conviction of perpetrators of forced labour and/or THB and give victims more possible remedies.

Figure 1 Continuum of exploitation and intervention



7 Conclusions

Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Palermo Protocol) was the first time States agreed upon a universal definition of Trafficking in Human Beings. For trafficking to be present, three elements must be fulfilled being act, means and purpose. However it is sometimes argued that the requirement of the element of means is restricting the definition, in concrete cases this is not true. One of the core elements of this definition is the term 'exploitation'. When reading the second paragraph of article 3(a) it becomes clear that 'exploitation' is not only sex-related, but that forced labour can be a form of exploitation as well.

The *Rantsev* case, a judgement of the European Court of Human Rights is a landmark case in combatting forced or compulsory labour because the Court decided that it had to interpret the European Convention on Human Rights 'in light of present day conditions'. Following from this reasoning, the Court decided that trafficking itself within the meaning of article 3(a) of the Palermo Protocol, falls within the scope of article 4 of the Convention on Human Rights that protects people *inter alia*, against forced and compulsory labour. Furthermore *Rantsev* created three obligations for Member States of the EU. States must have in place a legislative and administrative framework to prohibit and punish trafficking, States are required to take measures to protect victims or potential victims of trafficking where circumstances give rise to a credible suspicion of trafficking and States have a procedural obligation to investigate situations of potential trafficking not only domestically but to cooperate effectively with other States concerned.

It is important to keep in mind that the Palermo Protocol is supplementing the UN Convention against Transnational Organized Crimes and therefore the Protocol and the Convention should be interpreted together.

The ILO Forced Labour Convention C29 defined forced labour 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'. Three elements can be distinguished from this definition being work or service, penalty and the voluntary offer. Each of these elements in itself has deeper rationales, and it is therefore important to interpret them as such.

According to the ILO Global Report 2009, a forced labour situation is determined by the nature of the relationship between the employer and the employee, not by the nature of the work itself. This is an important statement because it allows for better prosecution of perpetrators. Regarding forced labour, the ILO created a list of indicators to help determine whether a situation of forced labour exists. Generally, if two out of the six indicators are present, there is most likely a forced labour situation. I believe that these indicators can prove of great use for States who struggle with identifying possible forced labour situations as well as situations of THB for labour exploitation.

When it comes to penalizing forced labour, two problems arise: first of all is the lack of specific definitions in national laws and the second one is a consequence from the first one. Lacking a specific definition makes it hard for law enforcers to prosecute the offence. The aforementioned Global Report pleads for legislation against both forced labour and trafficking separately because of the fact that not all forced labour is an outcome of trafficking. Personally I believe that the creation of several

separate provisions is the best way in which Member States should implement the required provisions and offences. This however should be done with a system of what I call a 'reversed pyramid'. Member States should use the most comprehensive definition as a starting point, which they then divide in separate provisions in a way that all elements of the original required provision are embedded in their national law.

An important issue regarding THB and forced labour is the statement of an Experts Group on Trafficking in Human Beings, in a report commissioned by the European Union in 2003. This Expert Group identified forced labour exploitation as the 'crucial element' of the Trafficking Protocol. According to them 'policy interventions should focus on the forced labour and services, rather than (or in addition to) the mechanisms of trafficking itself'.

Regarding the continuum of exploitation created by Klara Skrivankova I recommend that States start to use this concept to better identify possible situations of deprivation of the positive extremity of decent work. Furthermore, the continuum helps to search for effective remedies in different exploitive situations, ranging from minor violations of labour standards to gross violations such as forced labour exploitation. Remedies are found through labour law, criminal law or a combination of those two. The lack of a definition of the term 'exploitation' can lead to confusing situations on what it actually means. A solution for this should be sought.

The UK government has done and is doing a lot to combat forced labour as an outcome of trafficking, in first instance by recognizing that exploitation of migrants occurs in their country, which is a positive conclusion. In addition, the UK introduced relevant legislation such as the Immigration and Asylum Act, which penalizes the offence of trafficking for forced labour and the Coroners and Justice Act 2009, which clearly criminalizes forced labour in a separate provision. In addition the Gangmaster (Licensing) Act was created to monitor and license labour providers and it proves to be a more than moderate success according to the two discussed annual reviews. The UK's anti-trafficking legislation under the Immigration and Asylum Act however, focusses too much on the migration aspect and too little on the forced labour aspects. My opinion is that when States want to combat THB for labour exploitation, they should focus more on forced labour as a crime, rather than on the movement process of trafficking.

Agencies and gangmasters of other sectors of labour, which are not regulated by the Gangmaster Licensing Authority, should also be regulated by government authorities. I recommend that gangmasters and other labour providers in sending countries are also checked. This would be in fact a compliance with the desirable mutual cooperation of States. A European variant is possible, but it will take a lot of time and arrangements. I suggest a centrally arranged and controlled agency under the auspice of the European Union, using the model of an EU regulatory agency, with the legal basis in article 352 Treaty of Lisbon. Every Member State should have its own licensing authority division, comparable with the GLA in the UK, operating under a general European licensing act, comparable with the Gangmaster (Licensing) Act in the UK.

Creating separate provisions against forced labour and trafficking in human beings gives victims more remedies and enlarges the chance that perpetrators will be prosecuted and convicted. The standalone offence of forced labour should be dealt with both through labour law and criminal law and should therefore be criminalized. When we start to combat forced labour effectively as a

standalone offence, the combat against THB will benefit. As mentioned in the introduction, not all forced labour is an outcome of trafficking and not all trafficking cases lead to forced labour.

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