



Forced labour, back on the agenda

Standards to supplement the ILO Convention concerning Forced or Compulsory Labour (Co29) and their added value for the Netherlands

During the annual International Labour Conference that commenced on 28 May 2014, the International Labour Organization (ILO) is discussing whether further standards should be adopted to supplement the ILO Forced Labour Convention (Co29). According to the ILO, the Convention, which dates from 1930, is outdated and contains shortcomings as regards the prevention of forced labour, the protection of victims and compensation for victims. What is the scope of ILO Convention No. 29, what is its relationship with human trafficking and what precisely would the new standards involve?

1 Forced labour on the agenda

The current ILO Forced Labour Convention (Co29)¹ is outdated, some of its provisions are anachronistic and it contains a number of significant gaps. That, briefly, is the reason why talks have started at international level on further measures to supplement the convention.² The seeds for this debate were planted at the International Labour Conference in 2012, when a resolution was adopted calling for research into shortco-

1 International Labour Organization Convention concerning Forced or Compulsory Labour (No. 29), Geneva 28 June 1930, *Bulletin of Acts, Orders and Decrees* 1933, 236.

2 For a detailed review of the background to the supplementary standards, see International Labour Office, *Strengthening action to end forced labour. Report IV (1)*, Geneva: International Labour Office 2013.

mings in existing ILO conventions.³ The subsequent Meeting of Experts in 2013 reached the conclusion that there is a widely felt need to supplement the convention, particularly in three specific areas: the prevention of forced or compulsory labour, the protection of victims and compensation for victims.⁴

The debate during the International Labour Conference⁵ will embrace both the substance of the new standards and the type of instrument in which those standards should be laid down. Two options have been suggested. The first is the inclusion of the standards in a protocol that would, as it were, bring the convention up to date. The other is their inclusion in a recommendation, which would leave the convention intact but would encourage states to shape their policies in accordance with the principles laid down in the recommendation.⁶ As part of the convention, a protocol would be legally binding and therefore create obligations for the states that ratify it.⁷ A recommendation is not legally binding and therefore does not create any obligations and would consequently be 'less robust' than a protocol.⁸ A survey of states and organisations of employers and workers shows that a narrow majority of states expressed a preference for a protocol, in combination with the recommendation.⁹ The Dutch government has said that it will follow the view of the majority during the International Labour Conference.¹⁰

In addition to the form of the new instrument, the substantive measures will also be discussed in Geneva. At the end of March, after consulting the states and their organisations of employers and workers, the International Labour Office published draft texts of both the protocol and the recommendation.¹¹ This article is devoted mainly to the protocol. But it is important to be very clear about the subject matter of the additional standards and the article therefore commences with a brief description of the definition of forced or compulsory labour, with particular attention to the position of that definition in the Dutch legal system and the (close) relationship between forced labour and human trafficking.

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- 3 This resolution called for research to identify existing gaps in the scope of application of ILO conventions with the view to possible supplements to existing ILO conventions on forced labour and explicitly mentioning the relationship between forced labour and human trafficking. See International Labour Conference, *Resolution concerning the recurrent discussion on fundamental principles and rights at work, adopted in Geneva on 13 June 2012*, para. 22 under (c).
- 4 International Labour Office, Tripartite Meeting of Experts on Forced Labour and Trafficking for Labour Exploitation (Geneva, 11-15 February 2013), *Report for discussion at the Tripartite Meeting of Experts concerning the possible adoption of an ILO instrument to supplement the Forced Labour Convention, 1930 (No. 29) (TMELE/2013)*; *Final report (TMELE/2013/7)*; *Conclusions adopted by the Meeting (TMELE/2013/6)*.
- 5 The International Labour Conference has a tripartite structure comprising representatives of governments and organisations of employers and workers.
- 6 If the option of a protocol is chosen, it will probably incorporate the recommendation.
- 7 For a detailed discussion of the distinction between a protocol and a recommendation, see International Labour Office, *Strengthening action to end forced labour. Report IV (1)*, Geneva: International Labour Office 2013, p. 67. See also K. Boonstra, 'De ILO als normsteller', in: Ministry of Social Affairs and Employment, *Decent work op de Agenda. Nederland en de normen van de Internationaal Arbeidsorganisatie*, The Hague: Ministry of Social Affairs and Employment 2008, p. 25.
- 8 It is for this reason that some NGOs have called for the adoption of a protocol. See, for example, an editorial article by N. Varia of Human Rights Watch: N. Varia, 'Slavernij is 150 jaar geleden, maar tegen moderne vormen doen we te weinig', *De Volkskrant* 30 April 2014.
- 9 Of the 90 states that responded, 44 opted for a protocol with a recommendation and 41 opted for only a recommendation. International Labour Office, *Strengthening action to end forced labour. Report IV (2A)*, Geneva: ILO 2014, p. 16. A majority of the employers' organisations that responded (15/26) favoured a recommendation. The large majority of workers' organisations favoured a protocol with a recommendation; only two of the 72 organisations that responded voted for a recommendation.
- 10 Letter from the Minister of Social Affairs and Employment concerning the 103rd International Labour Conference 2014 of 9 May 2014.
- 11 The texts are included in International Labour Office, *Strengthening action to end forced labour. Report IV (2B)*, Geneva: ILO 2014.

2 The definition of forced or compulsory labour and the link with human trafficking

ILO Convention No. 29 (hereinafter referred to as the Convention) relates to ‘forced or compulsory labour’,¹² which is defined in Article 2(1) of the Convention as:

‘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.’¹³

In other words, it covers labour or service, in the sex industry or any other sector,¹⁴ that is demanded of a person under the threat of any punishment and which that person has not voluntarily offered to perform. With the concept of ‘penalty’ in this definition, the authors of the Convention mainly had in mind the threat of penal sanctions and the loss of rights and privileges.¹⁵ At the time it was drafted, the Convention related mainly to work that people were compelled to perform by states themselves. Developments such as globalisation, liberalisation and privatisation have led to a transformation and forced labour is now also prevalent in the private sector.¹⁶ Although the definition of forced labour has not changed since 1930, the forms of forced labour and the context in which it occurs have changed significantly. For this reason, the ILO now deems ‘menace of any penalty’ to cover a wide variety of means that a state or an employer can use to force people to work.¹⁷ In the context of forced or compulsory work, the involuntary nature of the work does not necessarily have to be the result of physical coercion, such as violence or a threat of violence; the compulsion can also assume more subtle forms, such as the confiscation of identity papers or psychological pressure. The term ‘menace’ in ILO Convention No. 29 therefore shows similarities with the means of subtle coercion in the definition of human trafficking: deception, misuse of authority arising from the actual state of affairs and abuse of a position of vulnerability.¹⁸ The ILO states that there is an overlap between the element ‘menace of any penalty’ and ‘not voluntarily’; where the willingness to work (‘offer’) is induced by a threat (‘menace of any penalty’), it can no longer be regarded as a ‘voluntary offer’.¹⁹

12 For the reader’s convenience, wherever possible the term ‘forced labour’ will be used in the remainder of this article.

13 International Labour Organization Convention concerning Forced or Compulsory Labour, Geneva 28 June 1930, *Bulletin of Acts, Orders and Decrees* 1933, 236.

14 According to the ILO, ‘all work or service’ refers to ‘all types of work, service and employment, in any activity, industry or sector, including in the informal economy’. International Labour Office, *Strengthening action to end forced labour. Report IV (1)*, Geneva: International Labour Office 2013, p. 8.

15 Loss of rights and privileges might, for example, mean the situation where a promotion or a different job is made dependent on performing certain work. International Labour Conference, *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008. Report III (Part 1B)*, Geneva: International Labour Office 2012, p. 111.

16 On this point, the International Labour Office said in a recent report: ‘State-imposed forced labour is declining in importance when compared to the extent of forced labour in the private economy. Of course, vigilance is needed to prevent state-imposed forced labour from resurging. But attention must now be focused on understanding what continues to drive forced labour and trafficking in the private sector’. International Labour Office, *Profits and Poverty. The Economics of Forced Labour*, Genève: International Labour Office 2014, p. 1.

17 On this point, the International Labour Conference has said: ‘Menace of any penalty should be understood in a very broad sense: it covers penal sanctions, as well as various forms of coercion, such as physical violence, psychological coercion, retention of identity documents, etc.’. International Labour Conference, *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008. Report III (Part 1B)*, Geneva: International Labour Office 2012, p. 111.

18 International Labour Office, *Strengthening action to end forced labour. Report IV (1)*, Geneva: International Labour Office 2013, p. 12. For a detailed discussion of means of coercion in the definition of human trafficking and the distinction between violent, physical and subtle, manipulative means of coercion, see National Rapporteur on Trafficking in Human Beings (2012). *Case law on Trafficking in Human Beings 2009-2012. An analysis*. The Hague: BNRM, pp. 50 et seq.

19 International Labour Conference, *General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105). Report III (Part 1B)*, Geneva: International Labour Office 2007, p. 20.

In the words of the ILO, the definition of forced or compulsory labour is still ‘entirely relevant today’.²⁰ The definition will therefore remain intact; the new standards are not intended to amend it. The article that includes the definition is in fact one of the few provisions of the Convention that will remain intact if a protocol is adopted. Most of the articles will lapse because of their outdated nature.²¹

The link with human trafficking, in the Netherlands and elsewhere

Forced labour and human trafficking are closely related phenomena.²² In the *international* definition of human trafficking, which has been adopted in Article 273f (1)(1) of the Dutch Criminal Code (DCC), human trafficking is defined as an *act* (such as recruiting, transporting or providing accommodation) using a *means of coercion* and with a specific *intention*: the exploitation of another person or the removal of that person’s organs.²³ Pursuant to Article 273f(2) DCC, exploitation includes forced or compulsory labour (and services), in addition to practices such as slavery and servitude. In other words, the aim of the human trafficking activity is generally the exploitation of another person, one form of which is forced or compulsory labour. Under this definition, a person does not already have to have worked. But that will generally have been the case, thus creating an overlap between the two phenomena. The ILO therefore also sees forced labour that is a result of human trafficking as a form of forced or compulsory labour.²⁴ However, human trafficking does not always have to be aimed at forced labour and forced labour can also occur, on the basis of the international definition of human trafficking, without being preceded by human trafficking.²⁵

In the Netherlands, the distinction between forced labour and human trafficking is not an issue. Article 273f (1)(4) DCC contains the criminal offence that comes closest to the definition of forced labour. The Dutch legislature has also assigned the label of ‘human trafficking’ to the act described in that subsection, so that the two concepts overlap in the Dutch context. In other words, on the basis of the Dutch criminal law, every form of forced labour *also* constitutes human trafficking. Article 273f(1)(4) DCC criminalises the person who:

“forces or induces another person by any of the means referred to under (a) to make himself/herself available for performing work or services or making his/her organs available or takes any action in the circumstances referred to under (a) which he knows or may reasonably be expected to know will result in that other person making himself/herself available for performing labour or services or making his/her organs available.”

20 International Labour Office, *Strengthening action to end forced labour. Report IV (1)*, Geneva: International Labour Office 2013, p. 14.

21 The ILO Convention was adopted mainly against the background of Western colonisation of overseas territories. Many provisions are therefore formulated with that in mind. With the entry into force of a protocol, Article 1 (sections 2 and 3) and Articles 3-24 will lapse. The provisions that remain will include those containing the duty to suppress forced or compulsory labour (Article 1(1)), the definition of forced labour and the exceptions to it (Article 2) and the duty to make forced labour a criminal offence, to ensure that the penalties are really adequate and are strictly enforced (Article 25). International Labour Office, *Strengthening action to end forced labour. Report IV (1)*, Geneva: International Labour Office 2013, pp. 67-68.

22 A.T. Gallagher, *The International Law of Human Trafficking*, New York: Cambridge University Press 2010, p. 49, footnote 163. The ILO regards human trafficking as the most urgent problem in relation to ILO Convention No. 29: ‘The increasing trend of the trafficking in persons for the purposes of sexual and labour exploitation stands out as the most urgent problem of the twenty-first century in relation to Convention No. 29.’ International Labour Conference, *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization. Report III (Part 1B)*, Geneva: International Labour Office 2012, p. 388.

23 If human trafficking is committed against minors, by virtue of Article 273f(1)(2) DCC the requirement of the use of a means of coercion does not apply. In that situation, therefore, it is sufficient to prove that an act was committed with the intention of exploitation (or organ removal).

24 International Labour Office, *Strengthening action to end forced labour. Report IV (1)*, Geneva: ILO 2013, p. 3.

25 A.T. Gallagher, *The International Law of Human Trafficking*, New York: Cambridge University Press 2010, p. 49, footnote 163.

Here too, there is no requirement that the other person has already actually worked.²⁶ The means of coercion have a similar function as in the ILO definition of forced or compulsory labour: they are means that establish the involuntariness. As already shown above, coercion is understood in a broad sense in the definition of human trafficking. The use of violence is the most obvious example, but it is actually the subtle forms of coercion that have been charged and proved most often in the case law in recent years.²⁷ In the process, the definitions of the subtle forms of coercion have been fleshed out in detail in Dutch case law. Consequently, the Netherlands seems to have developed a more elaborate interpretation of the concept of forced labour than has been formulated at the level of the ILO.

The relationship between forced or compulsory labour and human trafficking is also addressed in the draft versions of the protocol and the recommendation. The preamble to the draft protocol states that ‘trafficking in persons for the purposes of labour or sexual exploitation is the subject of growing international concern and requires urgent action for its effective elimination’.²⁸ Furthermore, the draft protocol contains a provision obliging states to adopt effective policies to combat human trafficking for the purpose of labour exploitation and sexual exploitation.²⁹ In other words, the ILO explicitly places additional standards on forced labour in the context of suppressing human trafficking.

3 A look at the new standards

On the basis of consultation with the participating countries, at the end of March the International Labour Office published drafts of the protocol and the recommendation which will be debated during the International Labour Conference.³⁰ As previously mentioned, the supplementary standards relate to three specific areas: prevention, protection and compensation. The standards in each specific area will be analysed in more detail in the remainder of this section, with commentary on each standard and special attention for the relationship between the standards and the provisions of EU Directive 2011/36/EU on human trafficking.³¹ In every case, reference will be made to the existing situation in the Netherlands. For the reader’s convenience, this article only reviews the provisions of the (legally binding) draft protocol. Where further explanation is needed, the provisions of the recommendation will be referred to.

General rules

Article 1(1) of the Protocol contains a generally formulated obligation on states to endeavour to take ‘effective measures’ in the three priority areas. Section 2 fleshes out this general rule, providing that effective measures shall in any case include the development of a national policy and plan of action to suppress forced labour.

26 The provision refers to ‘making available for’. In practice, there have been scarcely any cases in which offences under subsection 4 have been declared proven where victims have not already worked. For the background to and interpretation of Article 273(1)(4) DCC, see National Rapporteur on Trafficking in Human Beings (2012). *Case Law on Trafficking in Human Beings 2009-2012. An analysis*. The Hague: BNRM, pp. 76-85.

27 National Rapporteur on Trafficking in Human Beings (2012). *Case Law on Trafficking in Human Beings 2009-2012. An analysis*. The Hague: BNRM, pp. 57-58. These are the means of coercion ‘misuse of authority arising from the actual state of affairs’ and ‘abuse of a vulnerable position’. By virtue of Article 273f(6) DCC, abuse of a vulnerable position also covers the situation where a person has no real or acceptable alternative but to submit to the abuse. In the case law, situations that have been found to constitute a vulnerable position include poverty, debt problems, illegal residence and intellectual disability. For a detailed discussion of the element ‘abuse of a position of vulnerability’, see UNODC, *Issue Paper ‘Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons’*, Vienna: UNODC 2012.

28 International Labour Office, *Strengthening action to end forced labour. Report IV (2B)*, Geneva: International Labour Office 2014.

29 Article 1(3) of the Protocol. The article is discussed below.

30 Both draft texts are included in International Labour Office, *Strengthening action to end forced labour. Report IV (2B)*, Geneva: International Labour Office 2014.

31 Directive 2011/36/EU of the European Parliament and the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ 2011, L101/1).

Section 2 also instructs states to involve employers' and workers' organisations, as well as 'other groups concerned' in developing them. Examples would be trade associations or NGOs. The explicit link between forced labour and human trafficking is made in Article 1(3) of the Protocol, which provides that policy to suppress forced labour must also embrace action against human trafficking for the purposes of labour or sexual exploitation.

Prevention

Under Article 2 of the Protocol, states are obliged to adopt measures to prevent forced or compulsory labour. Three types of measures must be taken. The first is **educating and informing people (Article 2 (a))**, particularly those who are especially at risk of becoming victims of forced labour. The protocol does not give any specific examples of high-risk groups, but they have been mentioned repeatedly in ILO publications. Groups regarded by the ILO as vulnerable are labour migrants and persons working in the informal economy, as well as domestic staff, indigenous populations, ethnic minorities, the handicapped, children and young people.³²

Notably, Article 2(a) does not mention the importance of providing information in high-risk sectors,³³ since it is in these sectors that information is particularly important. The provision also does not specifically refer to identifying and providing training for officials who could come into contact with victims of forced labour, a target group that is explicitly mentioned in, for example, the EU Directive on Human Trafficking (Article 18 (3)). A protocol concerning forced labour might be expected to devote specific attention to the training of labour inspectors and investigating officers in the domain of work and income.³⁴ Failing to mention these professional groups, who play an essential role in suppressing forced labour in the Netherlands and elsewhere, would be a missed opportunity.³⁵

The second provision concerning prevention involves declaring all **legislation** relevant to forced or compulsory labour applicable to all workers in every sector. Essentially, this is a prohibition on making a distinction between groups of workers and sectors. The rationale behind this provision is to establish a robust legal position for all employees. In this context, legislation explicitly includes labour law. It is unclear whether the provision also extends to social security law.

If it does, it raises an interesting question that touches on the theme of harmonisation of the rights of all workers, regardless of the nature of the work performed. That is a subject that also arises in the context of the new ILO Convention No. 189 on decent work for domestic workers, which provides that the rights of domestic workers with respect to social security may not be less favourable than those of other employees (Article 14).³⁶ The Dutch 'Services at Home' scheme, which generally covers domestic help for private individuals, does create an exception to that provision: workers falling under the scheme are excluded from em-

32 International Labour Office, *Strengthening action to end forced labour. Report IV (1)*, Geneva: International Labour Office 2013, p. 5.

33 In the Dutch Rapporteur's Ninth Report, a high-risk sector is defined as a sector in which work is performed that by its nature inherently carries a risk that it will lead to a situation of exploitation, or in which the economic conditions create incentives for employers to take measures that could lead to a situation of exploitation. National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children (2013), *Trafficking in Human Beings. Ninth Report of the National Rapporteur*. The Hague, p. 108.

34 In the Netherlands, one would think mainly of the inspectors and investigating officers of the various agencies falling under the auspices of the Inspectorate of the Ministry of Social Affairs and Employment. Another example would be police officers who are engaged in tackling work-related exploitation.

35 Although Article 2(b) does include a general obligation to 'strengthen' the labour inspection services in order to prevent forced labour. That might also cover training.

36 International Labour Organization Convention on Decent Work for Domestic Workers, Geneva 16 June 2011, *Bulletin of Treaties* 2012, 193. See also the final report of the Services at Home Committee, which conducted research into the implications for the Netherlands of ratifying that convention (C189). Its conclusion was that ratification would necessarily entail the abolition of this scheme, but that it was uncertain whether the harmonisation of rights would also improve the de facto legal position of part-time domestic workers. Services at Home Committee, *Dienstverlening aan huis: wie betaalt de rekening? Advies commissie Dienstverlening aan huis*, The Hague 2014, p. iii.

ployee insurance schemes, do not accrue any pension rights via the employer and have only limited rights to continued payment of salary when they are ill.³⁷ The Netherlands therefore does not currently comply with the Convention³⁸, and for that reason has not yet ratified it. It remains to be seen whether ratification of the Protocol will add a new dimension to this issue.³⁹

The last provision relating to prevention concerns workers who use **recruitment and placement agencies**. States are obliged to take measures to protect workers against abuses and fraudulent practices by such agencies. There are frequently cross-border aspects to forced labour. Recruitment and placement agencies play a substantial role in terms of properly matching supply and demand for transnational labour. In recent years, however, even in the Netherlands it has been found that these intermediaries – between principals and workers – can be guilty of abuses, such as underpayment, employing illegal workers, providing poor accommodation and exploitation.⁴⁰

The subject has been one of the policy priorities of the Dutch Ministry of Social Affairs and Employment in recent years. The ministry has launched two projects aimed at combating these agencies: the ‘Tackling Rogue Employment Agencies’⁴¹ and ‘Tackling Sham Employment Constructions’⁴² programmes. The point of departure of both projects is more intensive supervision and enforcement, in some cases by deploying specially created enforcement teams. In that context, the Minister is also giving priority to expanding the principle of chain liability to make the principal legally responsible for the payment of (arrears of) salary to employees hired by its subcontractors.⁴³ Another point that needs to be mentioned in this context is the recent agreement on a proposed Enforcement Directive to accompany the EU Posted Workers Directive.⁴⁴

Identification and protection of victims

Articles 3 and 4 of the Protocol concern the protection of victims.

Article 3 is a broadly formulated provision which obliges states to take effective measures for the **identification and release, as well as the recovery, of victims** of forced labour. The draft of the recommendation details the measures envisaged by this provision (Article 7), including the provision of shelter and medical care, but also assistance in finding new work. An additional requirement for children is that a guardian should be appointed where necessary. Labour migrants who are presumed to be victims of forced labour are entitled to a period of reflection and recovery in order to make an informed decision on whether to cooperate with a criminal investigation or, for example, to institute a claim for payment of salary. The general formulation of Article 3 will probably have little added value for the Netherlands since the measures to be taken to protect victims are already described in greater detail in the EU Directive on Human Trafficking.

Article 4(1) of the Protocol contains the obligation to provide victims with **effective access to appropriate remedies**. Compensation is specifically mentioned, which will generally mean the institution of a claim for damages (see also Article 10 of the draft Recommendation). These obligations are already codified in the EU Directive on Human Trafficking. Broadly speaking, there are three options for victims seeking compensation

37 National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children (2013), *Trafficking in Human Beings. Ninth Report of the National Rapporteur*. The Hague, pp. 39-40.

38 Services at Home Committee, *Dienstverlening aan huis: wie betaalt de rekening? Advies commissie Dienstverlening aan huis*, The Hague 2014, pp. ii-iii.

39 A certain qualification needs to be made here. Article 2(b) provides that the rule is only applicable ‘*whenever necessary*’. However, it is not clear from the background documentation when this necessity would arise.

40 Letter from the Minister of Social Affairs and Employment of 12 May 2014 concerning measures to tackle rogue employment agencies and self-regulation.

41 See the letter from the Minister of Social Affairs and Employment of 12 May 2014 concerning measures to tackle rogue employment agencies and self-regulation.

42 Letter from the Minister of Social Affairs and Employment of 26 November 2013 concerning the progress report on measures to tackle sham employment constructions.

43 *Ibid.*

44 On this point, see the letter from the Minister of Social Affairs of 30 January 2014 concerning the significance of the agreement reached on the Enforcement Directive.

in the Netherlands: via civil law (Article 6:162 of the Dutch Civil Code); via criminal law by instituting a claim as an aggrieved party; and by submitting an application to the Violent Offences Compensation Fund.⁴⁵

Article 4(2) of the Protocol relates to the **principle of non-liability** for offences that victims of forced labour have been compelled to commit. This is the pendant of the principles of non-prosecution and non-punishment, as included in instruments such as the EU Directive on Human Trafficking (Article 8). The principles have the same rationale: no one should be punished for offences that are committed under duress. These are often offences that could be connected with a person's status as a victim of forced labour, for example possession of a false passport, illegal status or, in some countries, the simple fact of working in a particular sector, such as the sex industry.

The provision in the Protocol refers to 'offences' and therefore seems to be primarily concerned with sanctions under criminal law, unlike the principle of non-punishment in the Council of Europe Convention on Action against Trafficking in Human Beings, for example, which refers to 'unlawful activities' and therefore also seems to relate to offences under administrative law.⁴⁶ For the effective protection of victims of forced labour it is important that Article 4(2) also relates to administrative offences, so that the application of the provision does not depend on the legal domain into which the offence falls. That is particularly important in the Netherlands in light of the growing punitive role of administrative law; increasingly often, offences that used to be dealt with under criminal law are being disposed of by means of an administrative fine.

An interesting point is the formulation of the principle of non-liability in the Protocol. Article 4(b) refers to effective measures to protect victims of forced or compulsory labour from being held liable for offences they have been *compelled* to commit. Two models of the principle of non-punishment are employed at the international level. In the *duress* model, of which the provision in Article 4(b) is an example, there is a requirement that offences were committed under duress.⁴⁷ The duress might be one of the means of coercion referred to in the definition of human trafficking.⁴⁸ One requirement is that the duress must be established for each separate offence that was committed. The situation is different with the *causation* model, which has a wider scope. The principal requirement in that model is that the offences were committed as a *direct result* of the human trafficking situation (or situation of forced labour). This latter approach emphasises the context in which the offences were committed and consequently takes greater account of the actual situation in which criminal offences are committed by victims of human trafficking; it will not always be a specific means of coercion that induces a victim to commit certain offences but rather the overall context of coercion and dependency connected with human trafficking.⁴⁹

In the Netherlands, the principle of non-prosecution is inherent to the public prosecutor's discretion as to whether to prosecute or not (Article 167 of the Dutch Code of Criminal Procedure (DCCP)). In the near future the principles of non-prosecution and non-punishment will be explicitly inserted as specific grounds for refraining from prosecution in the Public Prosecution Service's Instructions on the use of grounds for dismissal of charges. The principle of non-punishment can be applied either by means of the judicial pardon (Article 9a DCC; a finding of guilt but with no sentence being imposed), the grounds for exclusion of criminal responsibility (of which duress is the most obvious) or mitigation of the sentence.⁵⁰

45 For a detailed discussion of the modalities for securing compensation under Dutch law, see National Rapporteur on Trafficking in Human Beings (2012). *Case Law on Trafficking in Human Beings 2009-2012. An analysis*. The Hague: BNRM, pp. 135 et seq.

46 Cf. Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw, 16 May 2005), Bulletin of Treaties 2006, 99.

47 A.T. Gallagher, *The International Law of Human Trafficking*, New York: Cambridge University Press 2010, p. 284. For a critical review of both models, see B. Hoshi, 'The Trafficking Defence: A Proposed Model for the Non-Criminalisation of Trafficked Persons in International Law', *Groningen Journal of International Law*, vol. 1, no. 2, p. 54-72.

48 A.T. Gallagher, *The International Law of Human Trafficking*, New York: Cambridge University Press 2010, p. 284.

49 C.E. Dettmeijer-Vermeulen & L.B. Esser, 'Het mensenhandelslachtoffer als dader. Een personele unie met grote gevolgen', *Strafblad* 2013-3, pp. 205-214.

50 *Ibid*

Article 4(2) of the Protocol does not refer to a duty to apply the principle of non-liability. Its application remains a discretionary power of the relevant professionals. At the same time, the formulation of the principle of non-liability in the protocol suggests a slightly more extensive duty than is laid down in the EU directive. For example, the directive refers only to a duty to take the necessary measures to ensure that the competent national authorities *are entitled* not to prosecute or impose penalties on victims of human trafficking. The Protocol refers to the duty to take effective measures to *protect* victims of forced labour from being held liable for offences. Rather than simply creating the possibility or authority not to prosecute, this formulation seems to place a greater emphasis on the responsibility of states to actually consider applying the principle in appropriate cases.

4 The added value of a protocol

This article has reviewed the scope of the draft protocol to supplement ILO Convention No. 29 concerning forced or compulsory labour, discussion of which will constitute an important element of the forthcoming International Labour Conference. It has been seen that there is a close relationship between forced labour and human trafficking. It has also been shown that many of the provisions contained in the protocol are already included in other international law instruments, including the EU Directive on Human Trafficking. The question that automatically arises, therefore, is what added value the proposed rules have for the Netherlands. It is also legitimate to ask whether a protocol might not lead to overlap and duplication of work, for example in terms of the obligation to report to the ILO on compliance with it. Given the substantial reporting obligations that already exist for the Netherlands under various international instruments pertaining to human trafficking, there is an understandable desire to consolidate these reports as far as possible on aspects where there is clearly an overlap. However, this reservation does not detract from the importance of supplementing ILO Convention No. 29 with a legally binding protocol. Ratification of the protocol would have four important advantages.

The 'labour perspective'

In the protocol, the problem of forced labour, and hence also human trafficking for that purpose, is primarily addressed from the labour perspective. Forced labour is seen as the 'dark side' of the labour market. Consequently, a lot of attention is devoted to the question of how the regulation of labour and the labour market can contribute to preventing forced labour and human trafficking. These standards could indeed play an important role in that respect, primarily in terms of prevention. The labour perspective will also highlight specific *modi operandi* and actors. For example, the protocol specifically refers to the duty of states to protect users of rogue recruitment and placement agencies. The protocol also explicitly assumes that all of the 'principal actors in the labour market' have a role to play in suppressing forced labour, in particular the social partners. By naming specific *modi operandi* and the social partners, the protocol goes further than the existing international legal instruments on human trafficking.

The link between forced labour and human trafficking

The protocol explicitly makes the link between forced labour and human trafficking. The ILO has drawn attention to that link in various reports, but has never previously expressed it in a convention. The fact that it is doing so now emphasises the 'human trafficking characteristics' of forced labour and underlines the ILO's observation that: 'The increasing trend of the trafficking in persons for the purposes of sexual and labour exploitation stands out as the most urgent problem of the twenty-first century in relation to Convention No. 29'. Attention to the relationship between the two themes will prevent policy discussions on the two themes being conducted separately despite the substantial overlap that exists between them. The explicit enunciation of the relationship between forced labour and human trafficking will therefore promote cohesion of policy and prevent duplication and ambiguities in legislation.

The relevance of the protocol for other countries

The protocol will be legally binding on the states that ratify it. The global nature of the ILO means that the protocol will be implemented in highly divergent contexts. Although the protocol is unlikely to lead to (radical) changes in the law in the Netherlands, it is expected to expose significant gaps in the implementation of measures to suppress forced labour in other countries, particularly in the areas of prevention and the protection of victims. Although a growing number of countries have now also adopted global and regional

legal instruments on human trafficking, the protocol can still have added value because, as has been shown, although the two phenomena are closely related to each other they do not always overlap at international level. The protocol will prevent a discrepancy arising between the approach to human trafficking and forced labour.

Signalling effect and global relevance of a protocol

Finally, the choice of a protocol will send the important signal that forced labour is high on the global political agenda. By ratifying it, states will demonstrate that, as a matter of principle, they are willing to combat forced labour and are committed to implementing legally binding obligations.