CLAIHR
Canadian Lawyers For International Human Rights

Investigating and Prosecuting Forced Migrant Labour at the International Criminal Court

Submission for the Office of the Prosecutor's Policy on Slavery Crimes

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I. Introduction

This commentary from the Canadian Lawyers for International Human Rights (CLAIHR)[1] draws from the unique dynamics and experiences brought on by migrant labour programs in Canada to illustrate the particular factors indicating forced migrant labour. It concludes by linking these factors to the prosecution of forced migrant labour under the crime against humanity of enslavement in the *Rome Statute of the International Criminal Court* (ICC).

The definition and elements of "enslavement" under Article 7(2)(c) of the *Rome Statute* require that the "perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty."[2] The ICC Elements of Crimes report explicitly states that:

[1] Canadian Lawyers for International Human Rights (CLAIHR), federally incorporated in 1992, is a non-governmental charitable organization comprised of lawyers, law students and legal academics, among others, working to promote international human rights within and in connection to Canada.

[2] *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) ("Rome Statute") at Art. 7(2)(c); International Criminal Court, Elements of Crimes, Art. 7(2)(c).

> It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.[3]

Forced labour is a particularly nuanced form of slavery crime. It is defined in the *International Labour Organization (ILO) Forced Labour Convention*, 1930 (No. 29), from which the *Supplementary Convention on the Abolition of Slavery* draws in its preamble, as "all work or service from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[4] In the context of migrant labour, determining whether such labour is, or has become, forced requires a number of contextual and dynamic considerations.

Framework

In assessing Canada's laws regarding migrant workers, alongside how CLAIHR considers the relationship between these laws and forced labour crimes, CLAIHR uses the ILO Indicators of Forced Labour. These represent "the most common signs or 'clues' that point to the possible existence of a forced labour case".[5] They include a variety of factors including "intimidation and threats", "withholding of wages", "debt bondage", "abusive working and living conditions" and more.[6] The ILO advises that just one indicator may be enough to deduce a setting of forced labour, but a contextual analysis that may require analysis of multiple indicators provides a basis to assess whether the crime of forced labour is present.[7]

Second, CLAIHR advocates for a victim-centered approach in assessing circumstances of forced labour and creating relevant guidance documents. Much has been written regarding a victim-centered approach and its place at the ICC.[8] This submission does not employ one singular framework to determine what a victim-centered approach looks like but draws from sources recognized in scholarship and international criminal justice mechanisms. CLAIHR argues that in developing policy regarding slavery crimes, the ICC should consider an approach that "aims to maximize choice and address each survivor's unique needs, contexts, and coping strategies".[9] It must also consider the numerous ways structural and physical discrimination can influence a victim, be it through gender, socioeconomic status, age, citizenship status, disabilities, language accessibility, and more.[10] These vulnerabilities require thematic strategies that CLAIHR addresses in these submissions.

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[3] *Ibid.*

[4] *International Labour Organization Forced Labour Convention*, 28 June 1930, No. 29, Art. 2(1).

[5] See International Labour Office, "ILO Indicators of Forced Labour" (2012) online (pdf) *International Labour Organization* at 2.

[6] *Ibid*.

[7] *Ibid*.

[8] See e.g., Nao Shimoyachi, "Between Accountability and Reconciliation: The Making of 'the Victim-Centered Approach' at the International Criminal Court" (2024) *Gl S Q* 4:2 1; Luke Moffett, "Elaborating justice for victims at the international criminal court: Beyond rhetoric and the hague" (2015) *J Intl C J* 13:2 281; Rianne Letschert and Jan Van Dijk, "Reconstructing victim-centered justice on a global scale" in Rianne Letschert and Jan Van Djik (eds), *The New Faces of Victimhood* (Springer, Global Justice Series: 2011).

[9] Lauren B Cattaneo et al "Survivor-Centered Practice and Survivor Empowerment: Evidence from a Research-Practitioner Partnership" (2020) *Violence Against Women* 27:9 online at 2.

[10] See International, Impartial and Independent Mechanism, "Victim/Survivor Centred Approach" (2011) online: *United Nations*.

II. Background on Migrant Labour Programs

Migrant Labour Globally and in Canada

The International Organization for Migration (IOM) recognizes that migrant labour does not have a definition in international law. However, the IOM offers a helpful working definition of "labour migration" as "the movement of persons from their home State to another State for the purpose of employment".[11] In its 2022 World Report, the IOM reported that international migration is increasing, and that two thirds of the nearly 281 million international migrants in 2020 were labour migrants.[12] There is a greater number of men than women migrant workers, and they are predominantly moving from low and middle income countries (LMIC) to higher income countries.[13]

Canada is significantly involved in this global trend and strong parallels can be drawn between certain elements of Canada's migrant work programs and that of other states, including those in the Arabian Peninsula. In 2017, Canada was home to 550,000 temporary foreign workers, under its Temporary Foreign Workers Program (TFWP).[14] These workers accounted for 15.5% of Canada's national employment in agriculture, forestry, fishing, and hunting sectors.[15] The countries of origin for these temporary foreign workers are also mostly LMICs, such as Mexico, Guatemala, and Jamaica.[16]

It is important to consider the socioeconomic challenges and resulting vulnerabilities migrant workers face when crafting law and policy. The indispensable role migrant workers play in Canada's economy highlights the need to define the responsibilities of states in receiving these migrants.

This submission also recalls that under the *Forced Labour Convention, 1930 (no. 29)*, forced labour has been defined as "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".[17] Canada ratified this convention in 2011.[18] The *Forced Labour Convention* allows a springboard to help identify forced labour as a slavery crime. CLAIHR notes the importance of Canada's ratification of this document, as Canada has not signed onto the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.* In a gap of international legal protection, the ILO definition provides an opportunity for rights-holders to find recourse.

Temporary Foreign Worker Program and How it Works

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[11] See International Organization for Migration, "IOM and Labour Migration" (2017) online (pdf): *International Organization on Migration* at 1.

[12] See M McAuliffe & A Triandafyllidou, *World Migration Report 2022*, *Report* at chapter 1 (International Organization for Migration: Geneva, 2022).

[13] *Ibid* at p 36.

[14] See Statistics Canada, "The distribution of temporary foreign workers across industries in Canada" (June 2020) online: *Statistics Canada* [archived].

[15] *Ibid*.

[16] See Statistics Canada, "Countries of citizenship for temporary foreign workers in the agricultural sector" (April 2024) online: *Statistics Canada*.

[17] See *CO29 – Forced Labour Convention 1930 (No.29)*, (1 May 1932), Geneva, ILC Session 14 <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029>.

[18] See International Labour Organization, "Ratifications of CO29- Forced Labour Convention, 1930 (No. 29)" (2023) online: *International Labour Organization*.

CLAIHR's submission primarily focuses on Canada's TFWP, which "allows Canadian employers to hire foreign workers to fill temporary jobs when qualified Canadians are not available".[19] It is primarily governed by the federal *Immigration and Refugee Protection Act* and accompanying regulations, while employment protection is regulated by the provinces.[20]

Prospective employers submit applications to Employment and Social Development Canada (ESDC) to hire these workers. Depending on the application stream, ESDC conducts a Labour Market Impact Assessment (LMIA) to "determine the likely effect these workers would have on the Canadian labour market".[21] ESDC states that an LMIA is created by "looking at available labour market information for the region and the occupation, the employers' recruitment and advertisement efforts, wages and working conditions, labour shortage and the transfer of skills and knowledge to Canadians".[22] If they have a positive or neutral impact on the Canadian Labour Market, they can then apply for a work permit. The Canada Border Services Agency then screens the individual for admissibility to Canada at an entry port.[23]

The program has the following streams: (1) High-wage; (2) Low-wage; (3) Primary Agriculture Stream (which includes workers in the Seasonal Agricultural Worker Program which will be addressed later); (4) Global Talent Stream; and (5) Caregiver Program.[24] Individuals hired under the low-wage can be paid less than the provincial or territorial median hourly wage.[25] Employers can have a maximum of 20-30% of their employees in these low-wage positions, and employees can be in the fields of construction, food manufacturing, hospitals, nursing and residential care facilities, accommodation and food services, and other sub-sectors.[26] The duration of a migrant worker's stay in Canada also depends on the LMIA, passport validity, and the job offer from the employer.[27]

Gaps in Rights Protection

Canada's TFWP has undergone much criticism for its failures to protect migrant workers. Much of migrant workers' vulnerabilities rest in the recruitment scheme. Although there have been numerous protections put in place recently (addressed below) many migrant workers still pay large sums to acquire these positions and are underpaid once they arrive in Canada; this creates a circumstance of debt and dependence upon the employer.[28] Once in Canada, foreign workers can be subject to harmful conditions as a result of unequal power between Canadian employer and foreign employee, and a consequent relationship of dependency. These have often been compared to conditions of forced labour.

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[19] See Employment and Social Development Canada, "Temporary Foreign Worker" (2024) online: *Government of Canada*.

[20] *Ibid.*

[21] *Ibid.*

[22] *Ibid.*

[23] See Fay Faraday, "Profiting from the Precarious – How recruitment practices exploit migrant workers" (2014) *Metcalf Foundation* (Report) online (pdf): *Metcalf Foundation* [Faraday].

[24] See Eleni Kchulis & Mayra Perez-Leclerc, "Temporary Foreign Workers in Canada Background Paper" (2020) *Library of Parliament* online: *Parliament of Canada*.

[25] See Employment and Social Development Canada, "Hire a temporary foreign worker in a high or low-wage position" (2024) online: *Government of Canada*.

[26] See Employment and Social Development Canada, "Program requirements for low-wage positions" (2022) online: *Government of Canada*.

[27] See Immigration, Refugees and Citizenship Canada, "How long can I work in Canada as a temporary worker?" (2024) online: *Government of Canada*.

[28] See *Faraday, supra* note 23.

Employers often provide housing and basic services, as workers often are required to live on the premises of their work and do not have access to social services in Canada.[29] This creates wide-sweeping restrictions over migrant workers' mobility and ability to associate with others. Additionally, it has been reported that employers may require migrant workers to perform work inconsistent with the restrictions outlined in their work permits. As a result, they end up working "without status", and therefore without protections of the *Immigration and Refugee Protection Act*. Thus, employers can then "make increased demands on the worker and effectively prevent the worker from complaining about mistreatment".[30] In 2007, it was reported that eleven Filipino workers paid large fees to labour brokers, and then 'sold' to employers who kept them in an isolated and remote-located home while paying them substantially lower wages than originally agreed.[31]

There have also been reports of fears of reprisal as employers have significant power over foreign workers, with the ability to have them deported. The Seasonal Agricultural Worker Program (SAWP) has been host to such abuse. Under the TFWP, this sub-stream allows employers in specific commodity sectors to host workers to carry out primary agriculture activities for a maximum of eight months between January 1 and December 15 of each year, and is reserved for workers from Mexico or participating Caribbean countries.[32] Under the SAWP, employers have discretion to terminate employees and can have that individual removed from Canada within 24-48 hours.[33] Furthermore, because this is a seasonal position, workers are incentivized to curry the favour of their employees so as to ensure an opportunity to return; thus they are disincentivized to voice complaints and/or assert their rights against their employers.[34] Women have reported unique harms of intense surveillance, sexual harassment, and unwanted pregnancies.[35]

Living on farms in often dismal conditions, the COVID-19 pandemic highlighted the inhumane settings such workers operate in. One report alleges migrant workers in Ontario were required to dust greenhouses with toxic chemicals to suppress bacteria growth but this burned their eyes, lungs, skin and contaminated food in their lunchroom.[36] The deaths of Bonifacio Eugenio Romero, Rogelio Munoz Santos, and Juan Lopez Chaparro from COVID-19 and unsafe working conditions under the SAWP were reviewed by Ontario's Deputy Chief Coroner. While everyday Canadians were required to self-isolate and social distance, these workers died from being forced to work in "congregate living and working conditions" while workplace inspections were paused for health and safety reasons.[37]

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[29] See Rishika Wadehra, "Equal rights for migrant care workers" (October 2021) *Canadian Centre for Policy Alternatives* online (pdf): *CCPA*.

[30] See *Faraday, supra* note 23 at 38.

[31] See Judy Fudge and Fiona MacPhail, "The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labour" (2009) *Comp Lab L & Pol'y J* (31:5) 5.

[32] See Employment and Social Development Canada, "Hire a temporary worker through the Seasonal Agricultural Worker Program: Overview" (2024) online: *Government of Canada*.

[33] See Bethany Hastie, "Renewing Labour's Engagement with Old Forms of Precarity: A Case Study of Unionization of Migrant Agricultural Workers in British Columbia" (2019) *Labour, Cap & Soc* 49:1, 28.

[34] *Ibid.*

[35] See Amy Cohen & Susana Caxaj, "Bodies and Borders: Migrant Women Farmworkers and the Struggle for Sexual and Reproductive Justice in British Columbia, Canada" (2018) *Alternate Routes: J Crit Soc Res* 90.

[36] See Hilary Beaumont, "'They care about their plants and not us': for migrant farmworkers in Ontario, COVID-19 made a bad situation worse" (2021) online: *The Narwhal*.

[37] See Reuven R Jhirad, "Deputy Chief Coroner's review: COVID-19 related deaths of temporary foreign agricultural workers in 2020" (2021) *Government of Ontario* online: *Government of Ontario*.

The Canadian government has responded to concerns regarding the TFWP and has implemented amendments to the *Immigration and Refugee Protection Act Regulations* that govern this program. This includes requiring an employment agreement between the employee and the foreign worker when applying for an LMIA, amending the definition of 'abuse' to include 'reprisal', prohibiting employers from charging fees, and more protections.[38]

However, these developments have not absolved the program of its flaws. For example, in 2020, a complaint was brought forward to the British Columbia Human Rights Tribunal by temporary foreign farm workers from Guatemala who alleged sexual harassment and "employment-related adverse impacts" influenced by their "Guatemalan race and place of origin".[39]

In October 2023, the UN Special Rapporteur on contemporary forms of slavery released a statement after their 14-day visit to Canada. He stated that 'Employer-specific work permit regimes, including certain Temporary Foreign Worker Programmes, make migrant workers vulnerable to contemporary forms of slavery, as they cannot report abuses without fear of deportation".[40] Without adequate monitoring and accountability of employers and their ability to exploit migrant workers, these workers are subject to conditions that could indicate forced labour, as this submission will illustrate.

III. Migrant Labour as Forced Labour

Forced migrant labour and trafficking is an exceptionally nuanced form of modern slavery. It can arise from many different labour situations, including for example, from domestic work or from physical labouring in the agricultural sector. Forced migrant labour is often difficult to identify on its face, especially considering that the crime is often committed in situations without obvious physical restraint and confinement and where the victim seemingly entered into an employment relationship voluntarily. Considerable caution must be exercised when determining the threshold at which migrant labor transitions into forced labour, taking into account contextual factors and relevant indicators necessary to identify it.

While CLAIHR advocates for the usage of the contextual factors and indicators described below, we must emphasize that investigators, prosecutors, and other members of the Office of the Prosecutor (OTP) should not approach forced migrant labour in a checklist fashion. They should be guided by the overarching and contextual victim-centered question that: given the heightened vulnerability of migrant workers and the deceptive, exploitative, coercive, and/or abusive practices that they have been subjected to, would a migrant worker in this specific situation with all their personal attributes and history, feel like they had no choice but to engage in the labour? OTP officials should also always be open to and aware of novel and unconventional factors indicative of forced labour unaddressed in literature or precedents.

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[38] See *Immigration and Refugee Protection Regulations* SOR/2002-227; See also Immigration, Refugees, and Citizenship Canada, "New amendments to the Immigration and Refugee Protection Regulations (temporary foreign workers)" (2016) online: *Government of Canada*.

[39] See *Gatica and Migrante obo Temporary Foreign Workers from Guatemala v. Golden Eagle Blueberry Farm*, 2020 BCHRT 214 at para 16.

[40] See Tomoya Obokata, "End of Mission Statement" (6 September 2023) *Special Rapporteur on contemporary forms of slavery, including its causes and consequences* online (pdf): *OHCHR* <https://www.ohchr.org/sites/default/files/documents/issues/slavery/sr/statements/eom-statement-canada-sr-slavery-2023-09-06.pdf>.

Contextual Factors

The first guiding principle of this question concerns the contextual factors at play in the context of migrant labour, particularly in relation to the heightened vulnerability of migrant workers and systemic regulation of migrant labour programs. While the below contextual factors are often present, they are not exhaustive. Each situation must be carefully examined to fully appreciate the contextual dynamics at play.

Unequal Employment Relationship: To start, every employment arrangement inherently involves some level of inequality, and within this framework, migrant workers face heightened vulnerability due to various factors, including their lack of alternative working arrangements and prospects. In several migrant work programs, including Canada's, permits for migrant labour are tied to employment at one particular enterprise. This leads to a situation of extreme vulnerability, where the migrant worker has no choice but to comply with the employer's terms and conditions because they cannot legally work anywhere else. According to one migrant worker from Spain, "[t]he employer has full rights over your life, to call you at any moment, at any second, one hour in advance and tell you you have to be here and work in two hours or three hours. What do you do? You can't get another job so you tend to comply."[41] Due to this lack of alternatives, migrant workers often feel unable to complain about their conditions, causing further issues in identifying situations where there is forced labour.

Exclusion from State Services: Migrant workers come from foreign states and are not citizens of the host state; they do not enjoy legally binding rights to "fair and equitable treatment" and ILO conventions that seek to regulate the treatment of migrant workers have not been ratified by any major industrialized nation.[42] In addition, migrant workers are placed in situations where they do not have the same informal support systems from their home states. They have often left behind their families to carry out work without a full understanding of what that work will entail, leading to a situation of extreme isolation.

Isolation: Migrant workers also often do not speak the official or predominant language of the host state or region, fueling this experience of isolation from the general population and the social services that it may offer. This isolation can be exacerbated by geography and the nature of the work, such as in the Canadian context. For example, in 2014, the British Columbia Human Rights Tribunal found that African migrant workers in a remote area of British Columbia were subject to horrific conditions and had no money or transportation to leave; they were completely at the mercy of their employers.[43] Remote migrant work also increases the likelihood that the government is unable or unwilling to enforce any health, safety, and employment standards.

Discrimination: It is highly crucial to consider that migrant workers, particularly in the Canadian context, are usually from marginalized groups and regularly face discrimination on the basis of gender, sex, race, ethnicity, nationality, sexuality, religion, socio-economic status, language, and other factors. Not only does this discrimination further fuel isolation from the host population, but it also often manifests in abusive and negligent treatment. In the above-mentioned 2014 decision from British Columbia, the Tribunal found that the employers taunted the workers with racial slurs and epithets, and at least one worker testified that the work camp was divided along racial lines.[44] It also is important to emphasize that the nature of such discrimination is often intersectional. In the context of migrant domestic labour, the CEDAW Committee reported that:

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[41] Shantz, J, "'Slave-Like Conditions': Abuse of Foreign Workers in Canada" (2015) 27 *Employ Respons Rights J* 233 at 237.

[42] Shantz, J, "'Slave-Like Conditions': Abuse of Foreign Workers in Canada" (2015) 27 *Employ Respons Rights J* 233 at 238.

[43] *Balikama obo others v. Khaira Enterprises and others*, 2014 BCHRT 107.

[44] *Balikama obo others v. Khaira Enterprises and others*, 2014 BCHRT 107; Shantz, J, "'Slave-Like Conditions': Abuse of Foreign Workers in Canada" (2015) 27 *Employ Respons Rights J* 233 at 234.

> Women migrant workers often experience intersecting forms of discrimination, suffering not only sex- and gender-based discrimination, but also xenophobia and racism. Discrimination based on race, ethnicity, cultural particularities, nationality, language, religion or other status may be expressed in sex- and gender-specific ways.[45]

Systemic Nature: As migrant labour is usually facilitated pursuant to government regulations, it is important to consider that forced migrant labour could be a systemic crime. As described in the previous section, Canada's need for unskilled labour has led to a long-standing system of temporary migrant labour. Accordingly, any analysis of forced migrant labour should also look at the labour laws and regulations that make it possible. However, it is also important to keep in mind that while some systems of law in the context of migrant labour ensure protections on paper, states often fail to uphold these protections and enforce regulations whether through an unwillingness or lack of immediate capacity. The Canadian TFWP, for instance, is certainly guided by protections to prevent forced labour, but the state is often criticized as failing in its duty to uphold these protections through audits and other inspections.[46] Whatever the case maybe, it must be recognized that migrant work programs, such as Canada's, are conducted pursuant to state-regulated systems facilitated by not only the employers, but also government officials in immigration, economic, and border control roles from the host state and state of emigration.

Indicators

The ILO's Special Action Programme to Combat Forced Labour (SAP-FL) has published several indicators of forced labour, all of which are relevant to the context of forced migrant labour.[47] Drawing from the *ILO Forced Labour Convention, 1930 (no. 29)*, these indicators cover not only the conditions indicative of forced labour where it is being carried out, but also the trafficking and recruitment practices leading to forced labour. Analyzing the full temporal and geographical scope of the forced migrant labour context is crucial to fully understanding the experience of victims of this crime and ensuring any sort of effective accountability.

The indicators "represent the most common signs or "clues" that point to the possible existence of a forced labour case."[48] The SAP-FL adds that "the presence of a single indicator in a given situation may in some cases imply the existence of forced labour", while in other circumstances, the combination of several indicators will indicate forced labour.[49] These indicators are by no means exhaustive and apply to both the recruitment process and the destination where labour occurs.

First, while migrant workers are virtually always in positions of heightened vulnerability, the exploitation of such vulnerability is a strong indicator of forced labour. The ways that such abuse can manifest is endless. For example, at the recruitment end, the ILO highlights abuse by failing to provide adequate information, particularly in respect of living and working conditions. This is sometimes the case for temporary migrant

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[45] CEDAW, "General recommendation No. 26 on women migrant workers", (2008) C/2009/WP.1/R at para 14.

[46] Giuliana Grillo de Lambarri, New Canadian Media, "Canada's temporary migrant worker program fails both labourers and employers, Senate committee hears" 10 October 2023: online.

[47] International Labour Organization, Special Action Programme to Combat Forced Labour, "ILO Indicators of Forced Labour" 2012.

[48] International Labour Organization, Special Action Programme to Combat Forced Labour, "ILO Indicators of Forced Labour" 2012 at 2.

[49] International Labour Organization, Special Action Programme to Combat Forced Labour, "ILO Indicators of Forced Labour" 2012 at 3.

workers in Canada, who are not told that they will be living in overcrowded lodgings upon arrival.[50] On the destination end, the ILO highlights the example of abuse of vulnerability by creating a situation of full dependency on the employer. This dependency is increased when the employer has control over living space, food and nutrients, pay, etc

Closely related is the practice of deception used to exploit the vulnerable position of migrant workers. This can take many forms, ranging from false promises of obtaining citizenship or residency to the provision of false information concerning salaries, working conditions, and family reunification. Deception is a strong indicator of forced labour as it demonstrates the lack of a fully informed choice to enter into an employment relationship or remain in one. The West Coast Domestic Workers' Association documented in its 2014 report on "Labour Trafficking & Migrant Workers in British Columbia" that a common form of deception in Canada comes from informing migrant workers of the dangers that arise from not having proper immigration documents or status.[51] In turn, the workers become more reliant on the exploitative employer.

Further indicative of forced labour in the context of migrant work is the use of coercive practices. For instance, employers can restrict the movement of workers in a number of ways, including by locking them up or restricting their mobility. Another common coercive measure is the use of intimidation and threats, particularly manifesting in the threat of deportation or retribution if migrant workers raise complaints. In April 2014, Belizean migrant workers accused McDonald's Canada of requiring them to sign an agreement not to speak to the media about alleged abuses. At least one of them was fired by McDonald's after his online communications complaining about conditions were tracked.[52]

Physical and sexual violence is also an indicator of forced migrant labour, including as a coercive measure to ensure no one complains about the conditions of the work. Migrant domestic workers face additional risks related to their gender and sex, including gender-based violence. Victims then have little or no options of accountability due to fear from reprisals or merely being unable to manoeuvre the legal system of a foreign country in a foreign language.

Other coercive indicators of forced labour include the retention of identity documents, such as passports, preventing workers from leaving, as well as debt bondage and the withholding of wages. In the complaints concerning McDonald's Canada, the workers reported that they were forced to share an expensive apartment and the company deducted almost half of their paychecks to cover rent.[53] Payment was withheld for "expenses", which is also a common practice for recruiters, who may dupe migrant workers into significant debt due under the guise of transportation, permits, and housing fees.[54]

Abusive and poor conditions of employment and living conditions are also strong indicators of forced migrant labour. Migrant workers are sometimes subject to abusive circumstances of isolation, including as mentioned above, division on the basis of racial lines. Of particular note, migrant workers in Canada often have insufficient access to toilets and are living in cramped housing arrangements. As the Migrant Rights Network and Food & Farmworkers Working Group reported in 2021, in about 44% of cases, five to 10

[50] Kathy Tomlinson, Globe and Mail, "False promises: Foreign workers are falling prey to a sprawling web of labour trafficking in Canada" 5 April 2019: online.

[51] West Coast Domestic Workers' Association, "Labour Trafficking & Migrant Workers in British Columbia" (2014) at 39.

[52] Shantz, J, "'Slave-Like Conditions': Abuse of Foreign Workers in Canada" (2015) 27 *Employ Respons Rights J* 233 at 236.

[53] Shantz, J, "'Slave-Like Conditions': Abuse of Foreign Workers in Canada" (2015) 27 *Employ Respons Rights J* 233 at 236.

[54] International Labour Organization, Special Action Programme to Combat Forced Labour, "ILO Indicators of Forced Labour" 2012 at 21.

migrant workers shared one house.[55] During the COVID-19 pandemic, this significantly increased the likelihood of migrant workers in Canada contracting the virus.[56] In addition to living in cramped and unsanitary conditions, the United Nations Special Rapporteur on Contemporary Forms of Slavery found during his visit to Canada in 2023 that migrant workers had to work excessive hours with no access to overtime pay.[57] The ILO Committee of Experts has emphasized the issue of excessive overtime in particular, and has noted that when workers exceed regulated maximum hours, and when they fear that to do otherwise would mean losing their employment, these conditions indicate both poor working conditions as well as forced labour.[58]

National and regional courts have considered other indicators in the context of forced labour, but it is important that any analysis of a given situation must be approached with a clear understanding of the contextual factors at play for migrant work programs and the personal attributes and experiences of the particular workers. Investigation and prosecution of forced labour must always be attuned to the psychological experiences and reactions of the victims in determining whether the particular working arrangements are non-consensual.

IV. Forced Migrant Labour and the Rome Statute

Pursuant to Article 7(1)(c), the Rome Statute of the ICC prohibits enslavement as a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Article 7(2)(c) defines "enslavement" for the purposes of paragraph 1 as meaning "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children."

Traditional concepts of slavery, as defined in the 1926 Slavery Convention, have evolved in international jurisprudence to encompass a wide range of contemporary and modern forms of slavery, all of which are based on the exercise of any or all of the powers attaching to the right of ownership.[59] The meaning of enslavement provided in Art. (7)(2)(c) has been further elucidated in international jurisprudence and scholarship, especially in relation to novel and emerging forms of slavery. Three main features have been identified in relation to various forms of 'modern slavery', of which forced labour and domestic servitude has been widely recognized as one such kind: (i) **Coercion or force:** If individuals are compelled to work against their will through threats, violence, or other forms of coercion; (ii) **Abuse of power or control:** If those in positions of authority or control over migrants exploit their vulnerability to compel them to work under conditions they cannot refuse; and (iii) **Deprivation of liberty:** If migrants are restricted in their movements or otherwise deprived of their freedom in order to perform labour.

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[55] CBC News, "Housing conditions for migrant workers in Canada 'worse than if we were in prison,' new report says" 10 June 2021: online.

[56] ILO, "COVID-19 Among Migrant Farmworkers in Canada: Employment Strain in a Transnational Context" (2022) ILO Working paper 79.

[57] Darren Major, CBC News, "UN envoy links temporary foreign worker program to 'contemporary forms of slavery'" 6 September 2023: online.

[58] ILO Committee of Experts, "Eradication of forced labour - General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105)" (2007) at paras 132–133.

[59] ICTY, Prosecutor v. Krnojelac, "Judgement", IT-97-25-T, 15 March 2002, para. 359.

The factors and contextual elements relevant to identifying and investigating forced migrant labour inform the relevant issues pertaining to its prosecution under the crime against humanity of enslavement. In particular, important factors that the OTP must consider at this stage include the prevalence of psychological control as opposed to physical control, the extended temporal and territorial parameters of the crime, and the systemic nature of the programs that may facilitate forced migrant labour.

Psychological Control

The Trial Chamber in *Kunarac* opined that indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator; exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.[60] The denial of consent or freedom of choice has been repeatedly identified as a key indicator of forced labour rising to the level of modern slavery, as noted by the Trial Chamber in *Krnojelac*: "The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. What must be established is that the relevant persons had no real choice as to whether they would work."[61]

As highlighted above, there is mounting evidence regarding the coercive control and deprivation of liberty exercised by employers through migrant labour programs in Canada and elsewhere. Preliminary investigations into Canada's migrant labour programs indicate that a number of factors constituting forms of modern slavery are satisfied: migrant workers are subject to psychological control, control and restrictions placed on their freedom of movement, measures taken to prevent or deter escape, threats of force or coercion, and other indicia established by international jurisprudence as constituting modern forms of enslavement.[62] It is crucial to emphasize that there is no requirement that the victim be physically restrained and/or physically prevented from escaping in order for enslavement to be established: psychological, financial, and other non-physical means of control and deprivation of liberty are sufficient to establish the exercise of the right of ownership over a person. That being said, in many cases in Canadian migrant labor programs, migrant workers have reported their passports being confiscated and held by their employers, which may constitute physical restraint and deprivation of liberty in addition to psychological factors. In any event, CLAIHR advocates that a victim-centered approach must be pursued in determining the means of deprivation of liberty, focusing on whether the victim, in their particular circumstances, would feel that they have no choice but to work.

Temporal and Territorial Parameters

Trafficking and forced migrant labour practices indicated above also inform the proper temporal and territorial parameters over the crime against humanity of enslavement in this context. Deceptive, coercive, and abusive recruitment practices for forced migrant workers are part of the crime. These practices often establish the forced and/or misinformed basis for the migrant work and represent the beginning of the crime. The destination state, where the deceptive, coercive, and abusive treatment continues while the forced migrant worker carries out their work, is a direct continuation of the crime. Accordingly, CLAIHR urges

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[60] ICTY, Prosecutor v. Kunarac, Kovac and Vukovic, "Judgement", IT-96-23-T and IT-96-23/1-T, 22 February 2001, para. 542.

[61] ICTY, Prosecutor v. Krnojelac, "Judgement", IT-97-25-T, 15 March 2002, para. 359.

[62] ICTY, Prosecutor v. Kunarac, Kovac and Vukovic, "Appeals Judgement", IT-96-23-T and IT-96-23/1-A, 12 June 2001, para. 119.

the OTP to recognize and appreciate that prosecuting the crime against humanity of enslavement in the context of forced migrant labour would often require investigating situations in more than one state.

Systemic Nature

Finally, migrant labour is often carried out pursuant to state-regulated programs. When the practice of forced migrant labour is rampant within these programs and ingrained into the fabric and loopholes of government laws, the crime takes on a systemic nature and may amount to a systematic attack directed against a civilian population. CLAIHR recommends the OTP to consider that while direct perpetrators of forced migrant labour might not be state officials, they are often acting under a state-sanctioned system. The rules and regulations of any such program, as well as the conduct of state officials, must be scrutinized when investigating and prosecuting forced migrant labour as a crime against humanity. Given the principle of complementarity under which the ICC operates, CLAIHR further highlights the failure of the Canadian government to exercise proper oversight over its migrant labour programs and/or take sufficient steps to protect migrant workers from modern slavery.

V. Conclusion and Recommendations

CLAIHR urges the OTP to closely monitor allegations of forced migrant labour committed in Member States and by nationals of Member States. With migrant labour programs and opportunities rising across Canada and the rest of the globe, it is crucial that the OTP is able to recognize the widespread and systematic abuse, deception, coercion, and exploitation that rises with it. CLAIHR recommends that the OTP's policies in respect of investigating and prosecuting forced migrant labour under the crime against humanity of enslavement must:

I. Carefully consider the heightened vulnerability of migrant workers, the context in which they find themselves, and the various indicators of forced labour in the particular context of migrant labour;
II. Be guided at all stages by the perceived voluntariness of victims, taking into account their particular contextual circumstances;
III. Recognize and appreciate the extent of psychological control as a highly common element in forced migrant labour;
IV. Carefully consider the temporal and territorial parameters of the crime, as it begins in one state and continues in another;
V. Recognize and appreciate that forced migrant labour can be facilitated by state-regulated programs, practices, and lack of oversight.