



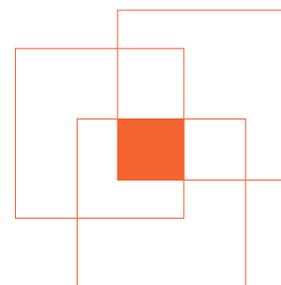
International  
Labour  
Organization

# Modern slavery: The concepts and their practical implications

Roger Plant

Paper presented at the Conference  
"Shaping the Definition of Human Trafficking",  
held at Dickson Poon School of Law, King's College London, May 2014

## Working paper





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International Labour Organization

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First published 2014

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## ILO Cataloguing in Publication Data

Plant, Roger

Modern slavery the concepts and their practical implications / Roger Plant ; International Labour Office. - Geneva: ILO, 2014, 30 p. (working paper)

ISBN: 978-92-2-129246-3 (web pdf)

International Labour Office

forced labour / trafficking in persons / definition / international law / legislation / national level / travail forcé / trafic d'êtres humains / définition / droit international / législation / niveau national / trabajo forzoso / trata de personas / definición / derecho internacional / legislación / nivel nacional

13.01.2

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Printed in Switzerland

# Foreword

In June 1998, the International Labour Conference (ILC) adopted a Declaration on Fundamental Principles and Rights at Work and its Follow-up that obligates member States to respect, promote and realize freedom of association and the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour and the elimination of discrimination in respect of employment and occupation. Those fundamental principles and rights at work are mutually reinforcing and are at the core of ILO's decent work agenda.

The Fundamental Principles and Rights at Work (FPRW) Branch is responsible for providing technical support and capacity building to ILO member States to assist them in fulfilling these obligations. It carries out technical cooperation activities and produces advocacy and knowledge tools – of which this Working Paper is an example. The Special Action Programme to combat Forced Labour (SAP-FL), which is located in the FPRW Branch, was established by the ILO Governing Body in 2001 as part of broader efforts to promote the 1998 Declaration and its Follow-Up.

This Working Paper was commissioned by SAP-FL in the context of ILO's recent standard setting process on forced labour. In March 2013, the Governing Body placed a standard-setting item on the agenda of the 103rd Session (2014) of the ILC, with a view to supplementing the Forced Labour Convention, 1930 (No. 29) and emphasizing prevention, protection and compensation measures. This decision followed the first recurrent discussion on fundamental principles and rights at work at the ILC in June 2012, and a Tripartite Meeting of Experts on Forced Labour and Trafficking for Labour Exploitation in February 2013. In June 2014, the ILC adopted a new legally binding Protocol to the Forced Labour Convention, 1930, supported by a Recommendation on Supplementary Measures for the Effective Suppression of Forced Labour (No. 203), to strengthen global efforts to eliminate forced labour. The new instruments bring the ILO's standards against forced labour into the twenty-first century to address effectively all forms of modern-day forced labour, including human trafficking. They complement existing international standards and aim to achieve greater policy coherence at national, regional and global levels.

The ILO's standard setting process on forced labour is part of a broader institutional effort to address unacceptable forms of work. Forced labour, human trafficking and slavery are among the worst forms of human exploitation found in today's labour markets. They are particularly pervasive in the informal economy but increasingly risk penetrating global supply chains. This series of Working Papers is meant to further stimulate discussion about the evolving concept of forced labour in international law and practice and its relationship with other unacceptable forms of work. Working Papers express the views of the author, which are not necessarily those of the ILO. As such, however, I hope that they will contribute to the on-going debate and stimulate further research in this area.

Corinne Vargha  
Chief, Fundamental Principles and Rights Branch  
Governance and Tripartism Department



## Preface

Recent research by the ILO has shown the alarming scale and persistence of forced labour today, with an estimated 21 million people subjected to forced labour worldwide, generating an estimated US\$150 billion in annual profits. The staggering scale of forced labour and the huge profits that are generated on the backs of trafficked and enslaved people have called policy makers to action. All across the world, legislators, government representatives, workers, employers, business, NGOs and citizens have come together to discuss and implement laws and policies to prosecute perpetrators, to mitigate the risk of forced labour in business operations and to assist those who have been exploited.

The prohibition of slavery, forced labour, institutions and practices similar to slavery and trafficking in persons are enshrined in international law, however debates about the relationship between these concepts – and how they should be translated into domestic law – have at times led to confusion about how best to tackle the enormous challenges posed by contemporary forms of forced labour or what is often called “modern forms of slavery”.

Roger Plant emphasises the importance of a pragmatic approach to these questions. In his paper, he lays out the important differences between individual and systemic cases of coercion – both historically and today – which necessitate distinct legal and policy responses. He concludes that rather than seeking an exact consensus over definitions, the focus should be on identifying the most appropriate forms of action, taking into account these differences, against the various forms of coercion and exploitation.

I am grateful to Amanda Aikman who managed the research project and to Caroline Chaigne-Hope who designed the layout of this working paper series.

Beate Andrees,  
Head, Special Action Programme to Combat Forced Labour

## Table of contents

1. Defining coercion and exploitation: The issues at stake.....	1
2. The legal concepts in historical perspective .....	5
Slavery and forced labour instruments of the 1920s .....	5
Legal instruments of the 1950s .....	6
2000 and beyond: International law and human trafficking .....	7
The 2014 ILO Protocol and Recommendation on Forced Labour.....	9
3. Slavery, slavery-like practices, forced labour, human trafficking and exploitation:	
Applying the concepts to the modern world.....	11
Forced labour exacted by the State .....	12
Coercion in conflict situations .....	12
Longstanding coercion linked to poverty and discrimination .....	12
Structural concerns and the modern global economy .....	15
4. When does terminology matter? Final reflections .....	19

# 1

## Defining coercion and exploitation: The issues at stake

The past few years have seen a significant intensification of global action against the forms of coercion variously referred to as slavery, forced labour, institutions and practices similar to slavery and human trafficking. As of the year 2000, when the first comprehensive international instrument against human trafficking (for purposes of either sexual or labour exploitation, or the removal of organs) was adopted, the main focus over the next decade tended to be on human trafficking. It was mainly on this subject that individual States tended to adopt new laws, or to insert new provisions into their existing criminal laws or other pertinent legislation; and to adopt new policies, plans of action and coordination mechanisms. In the first years of the decade, the primary emphasis was on human trafficking for the sexual exploitation of women and children. By the end of the decade there was far more emphasis on labour trafficking, and a growing realization that men as well as women and children could be subject to this form of abuse.

More recently, there has been a tendency to use “modern slavery” as an umbrella term to capture all these forms of coercion. It is an emotive term, and it has caused much debate as to what is covered. Slavery, forced labour and human trafficking are all defined in international legal instruments, which have enjoyed a high level of ratifications. The term “modern slavery” is not defined in international law. At the time of writing, however, the Government of the United Kingdom had introduced a Modern Slavery Bill, and held a series of parliamentary hearings on the subject. This suggests that the umbrella concept of “modern slavery” may henceforth figure in national laws to address these coercive practices.

Lawyers and analysts tend to emphasize the legal differences between these various concepts. While these undoubtedly exist, the concepts also overlap. And while scholars may debate these differences interminably, this paper takes a different and hopefully pragmatic approach. The most important things are to mobilize public opinion and policies; to eradicate the various forms of coercion and severe exploitation that have pervaded certain countries and societies for a very long time; and to identify the most appropriate forms of action in order to stand up to, and hopefully prevent, the newer forms of abuse that are now affecting almost every country of the world.

As clearly set out in international law, slavery, forced labour and human trafficking are all very serious crimes. The Forced Labour Convention, 1930 (No. 29), of the International Labour Organization (ILO) stresses that forced labour – which, as discussed below, may include slavery and human trafficking is a crime for which severe penalties should be established and strictly applied. While the 2000 United Nations (UN) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (“Trafficking Protocol”) contains no specific provision on the subject, this instrument was adopted within the framework of a UN Convention against Transnational Organized Crime, which requires States to ensure that sanctions under domestic law take into account the gravity of the offences.

Yet criminal law enforcement against individual offenders cannot be the only means of action against these abuses. Sometimes forced labour is directly exacted by the state. In many other cases the state has pursued migration management policies which effectively tie migrant workers to one employer and restrict their freedom, thus contributing to an environment in which coercion is likely to exist. And by far the greatest numbers exposed to coercive exploitation in the world today are those in the bonded labour systems of the South Asian countries, or similar forms of debt bondage in other developing countries. While criminal law enforcement against serious offenders may be part of the appropriate response, it may in fact be only a small part. The main strategic policies that tackled the slavery-like practices that pervaded rural areas of so much of the world in the twentieth century were land tenure and redistributive agrarian reforms, and the extension of labour rights including minimum wages to those who had previously been deprived of them.

And if by “modern slavery” we mean the contemporary forms of abuse that are now affecting many millions of women, children and men in the industrialized as well as developing countries, these are also systemic issues of governance. The more research that is conducted, the more it is realized that it is not only irregular workers in the underground economy who are exposed to labour trafficking. Temporary or contract workers with perfectly lawful contracts of employment can also be at risk. Given the chance, unscrupulous recruiters and employers are very adept at taking advantage of loopholes in the legal framework to cheat these vulnerable workers and deprive them of a fair wage. And the abuses are far more likely to flourish if systems of labour inspection, or for the licensing and monitoring of labour brokers and recruiters, are weak or non-existent.

In sum, one of the biggest challenges is to distinguish between individual and systemic cases of coercion. In the former, it should be possible to identify and punish one offender or group of offenders; and similarly to identify and provide appropriate assistance to one victim or group of victims. These are the cases most easily addressed through criminal law enforcement, together with appropriate mechanisms for victim assistance and compensation. In other cases, the main task is to eradicate the abusive recruitment and employment practices which may be very widespread, and which can also enjoy a high degree of cultural acceptance in some societies.

As will be argued throughout this paper, it can also be useful to distinguish between the “older” and “newer” forms of coercion and exploitation. These categories can never be absolute, because the older forms of abuse such as bonded labour in the Indian subcontinent tend to transmute into the “newer” ones with changes in patterns of production, migration and labour use. But in policy terms it is essential to understand when these abuses are a continuing legacy of the past, such as the widespread agrarian serfdom in many developing countries; and when they can be attributed to new forms of vulnerability, in particular when they can be associated with the economic and labour market changes that have come with contemporary globalization. For example, migrant workers have always been at risk, away from the protective social capital of their home communities. But the newer factors include the huge increase in female participation in the migrant labour force; the recent growth in “atypical” forms of employment beyond the reach of much national labour law; the emergence of complex forms of sub-contracting in which it can be difficult to pinpoint the responsibilities of the final employer towards the workforce; and as a consequence of this the emergence of labour brokers and recruitment intermediaries who often escape the attention of national labour inspection systems.

For these reasons the paper first adopts a historical approach, discussing the various concepts of coercion set out in international instruments, in the historical context in which they were first adopted. The main international instruments over the past century were those addressing slavery in 1926, forced labour in 1930, institutions and practices similar to slavery in 1956, state-sponsored forced labour in 1957, and then human trafficking in the year

2000. It can be argued that the earlier instruments were all seeking to eradicate (sometimes progressively over a period of time) *coercive systems* that were quite deeply entrenched at the time. They were all in part instruments of criminal justice, in that the practices were identified as serious crimes. But the main concern was to eradicate systemic practices that were once considered lawful. When the coercion was exacted by individuals in the private economy, the need was recognized for penal sanctions against the *offender*. But there was very little focus on the rights of the *individual* who had been wronged.

In this sense international law on the subject of human trafficking, which will be discussed further below, takes a very different approach. It is no accident that the Trafficking Protocol was adopted in the context of a new international instrument against organized crime, and that the main agency within the UN system responsible for its preparation and implementation has been the agency with a specific mandate on drugs and crime. In so far as it is an instrument of criminal justice, it thus places its primary emphasis on the punishment and prevention of crime, with a focus on the offender and the offended persons. At the same time, both the Protocol and the UN Convention against Transnational Organized Crime are instruments of international cooperation.

While focusing mainly on the individual and on individual crimes, the Trafficking Protocol has set the stage for a new and comprehensive approach to tackling coercion and exploitation, which was absent in the earlier international instruments. Broadly speaking, this involves the three pillars of prosecution, prevention and protection (generally known as the “three Ps”, sometimes complemented by a fourth P on partnership). This has been further refined in later regional instruments on human trafficking, such as the 2005 Council of Europe Convention on Action against Trafficking in Human Beings, which gives yet stronger emphasis to the “victim centred approach”. One of the great challenges of the past decade has been how to anchor the present-day movement against human trafficking, which had its origin in an instrument on organized crime, more squarely in the area of work for the promotion and protection of human rights.

Of all the concepts now on national and international agendas, certainly the most difficult is that of *exploitation*. It has never been defined in international law. However, it is a broad concept that underpins the notion of “purpose” in the definitional article of the Trafficking Protocol. All human trafficking, whether for sexual or labour purposes, is for the “purpose of exploitation”. Common sense indicates that people are exploited when they are unfairly treated, and receive less than a fair reward for the services provided. But the linkage between the concepts of *coercion* and *exploitation* can be a very difficult one to comprehend. The ILO’s concept of *forced labour* clearly involves coercion, though it can comprise both psychological forms of pressure as well as overt physical coercion, and the means of coercion can sometimes be very subtle. *Slavery* also involves the clear deprivation of human freedom.

*Exploitation* does not of necessity involve the use of *coercion*, as embodied by the concepts of forced labour or slavery. Much exploitation certainly is coercive, in that vulnerable persons endure sub-standard working or living conditions, as a result of force, fraud or deception. But it is widely known that, when there are huge wage differentials between countries of origin and countries of destination for prospective migrant workers, these migrants may readily accept conditions in the destination countries that would generally be considered sub-standard by the residents of these countries.

A key policy question is therefore how to address the issue of exploitation in the broader sense, whether or not coercion is involved. Some countries have actually interpreted the offence of human trafficking as the existence of sub-standard living and working conditions or “conditions incompatible with human dignity”. Brazil’s concept

of *trabalho escravo* (slave labour) in its criminal law embraces both the concept of forced labour in the sense of the ILO instruments on the subject, and degrading conditions of work.

It is important not to confuse the concepts of *trafficking for labour exploitation* on the one hand, and *labour exploitation* more generally on the other. Severely exploitative labour practices are concerns that would normally be dealt with through labour justice, with its own remedies and penalties, rather than through criminal law. Yet there can be an overlap between the two. Spain's penal code, for example, has a chapter on criminal labour law, articulating the abuses of labour rights than can amount to a criminal offence. When Germany amended its penal code in 2005 to introduce the specific offence of trafficking for labour exploitation, this was included under "crimes against personal freedom". Under the relevant section, the offence of labour trafficking involves not only bringing in migrant workers under conditions of "slavery, servitude or debt bondage", but also employing them under conditions markedly out of proportion to those offered to German nationals.<sup>1</sup>

In one significant case moreover a superior court has passed judgment, instructing lower courts to focus on the objective factors of exploitation, rather than seeking proof of deliberate intent to coerce workers into exploitation. In 2005 the Netherlands amended its Criminal Code, to the effect that the offence of human trafficking covered labour as well as sexual exploitation. The lower and appeal courts then threw out almost all the prosecuted cases, arguing that it was impossible to prove the intent of defendants to exploit their victims. In a well known "Chinese case" of October 2009, the Supreme Court stepped in and overthrew an appeal court acquittal, insisting that judges must also consider such abuses as appalling living and working conditions.<sup>2</sup> Dutch convictions have gone up rapidly since that judgment.

In the final instance, it is only the courts in a democratic system that can determine whether or not a perceived case of labour exploitation amounts to the criminal offences of forced labour, slavery or human trafficking. In the meantime, as the momentum grows, different actors are using a range of indicators and guidance tools to identify *likely* cases. These may be recorded in a National Referral Mechanism, or similar data collection system, allowing the recorded victim to receive some protection, and perhaps compensation for the wrongs suffered. But it is often argued with some reason that there is a *continuum* between the cases of lesser gravity, and the most serious ones where the full force of criminal law should be applied. As observed in the ILO's 2009 global report on forced labour:

The present Report .... accepts, as does much analysis on this subject, that there is a continuum including both what can clearly be defined as forced labour and other forms of labour exploitation and abuse. It may be useful to consider a range of possible situations with, at one end, slavery and slavery-like practices and, at the other end, situations of freely chosen employment. In between the two extremes, there are a variety of employment relationships in which the element of free choice by the worker begins at least to be mitigated or constrained, and can eventually be cast into doubt.<sup>3</sup>

This paper is written at another key historical moment, following the ILO's adoption, in June 2014, of a new Protocol and Recommendation to supplement its earlier instruments on forced labour. This now enables the ILO itself to embrace new thinking on the most effective ways to tackle forced labour and human trafficking, in particular the integrated approach combining the focus on prosecution, prevention and the protection of victims.

1 Strafgesetzbuch [StGB] [German Penal Code] § 233 (author's translation).

2 Hoge Raad der Nederlanden [Supreme Court of the Netherlands], 27 Oct. 2009, LJN BI7099, 08/03895.

3 ILO: *The Cost of Coercion*, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report I(B), International Labour Conference, 98th Session, 2009, para. 43.

# 2

## The legal concepts in historical perspective

### Slavery and forced labour instruments of the 1920s

The preparation of the first international instruments against slavery and forced labour took place at the same historical period, almost a century ago in the 1920s. It was a time when a large part of the world was under colonial rule, when forced labour was widely exacted by colonial powers as a means of collecting taxes or for the development of the general economic infrastructure, but when there were growing concerns about the abuses associated with some of these practices. It was also a time when, following the zenith of the anti-slavery movement in the late nineteenth century, there was a renewed determination to eradicate the remnants of outright slavery and the slave trade.

In 1922 the League of Nations took steps to examine the question of slavery and established a Temporary Slavery Commission to ascertain the facts regarding slavery and to make proposals for addressing the problem. It recommended that some of its proposals should be embodied in an international Convention. A Convention was finally approved by the Assembly of the League in September 1926.<sup>4</sup> Slavery is defined as the “status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”. There is a further extensive definition of the slave trade, involving every act of trade or transport in slaves. In Article 2, the Parties to the Convention undertake to “prevent and suppress the slave trade”, and to “bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms”.

Article 5 of the Slavery Convention makes specific reference to forced labour. The Parties recognize “that recourse to compulsory or forced labour may have grave consequences and undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage, to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery”. With certain exceptions, forced labour may only be exacted for public purposes. In territories in which compulsory or forced labour for other than public purposes still survives, the Parties shall endeavour “progressively and as soon as possible to put an end to the practice. So long as such forced or compulsory labour exists, this labour shall invariably be of an exceptional character, shall always receive adequate remuneration, and shall not involve the removal of labourers from their usual place of residence”. In all cases, responsibility for any recourse to forced labour shall rest with the competent central authorities of the territory concerned.

At the same time, the newly created ILO began to prepare standard setting on forced labour. In 1926, its Governing Body appointed a Committee of Experts on Native Labour, whose task was the study of the existing systems of forced or compulsory labour, especially in countries which were not self-governing. Its work led to the adoption in 1930 of the first Forced Labour Convention (No. 29), and two complementary Recommendations. As observed

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<sup>4</sup> In Resolution 475 (XV) of 27 April 1953, the UN Economic and Social Council recommended that the General Assembly invite the States Parties, or State which might become Parties, to the 1926 Slavery Convention to agree to the transfer to the UN the functions undertaken by the League of Nations under that Convention, and requested the Secretary General to prepare a draft Protocol to that end. Such a Protocol was approved by the General Assembly in October 1953.

by one expert, the principal aim of this instrument was “to fight against the forms of forced labour for economic purposes which were practised in colonial territories in order to obtain labour which was not forthcoming spontaneously, and this was done within a system of administration which relied to a great extent on traditional tribal relationships”.<sup>5</sup>

Over 80 years later, the ILO’s first Convention on forced labour actually makes for quite difficult reading. It is among the most ratified of all the ILO instruments, and is considered among the ILO’s fundamental human rights Conventions. Forced labour is broadly defined as any work or service which persons enter against their freedom of choice, and which they cannot leave without punishment or the threat of punishment. Article 25 established the important principle that the illegal exaction of forced labour is a *criminal offence*. “The illegal exaction of forced 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.”

Convention No. 29 provides for a number of exceptions from its coverage.<sup>6</sup> The general spirit of the Convention is to prohibit any form of forced labour by private companies. It called for the immediate abolition of forced labour for private purposes. A transitional period, of five years in the first instance, was permitted for achieving the progressive abolition of forced labour imposed for public purposes.<sup>7</sup>

In sum, these two earlier instruments set the stage for the subsequent prohibitions on slavery in future standard setting instruments, such as the UN Covenants on human rights. There are basic and brief definitions of both slavery and forced labour, which are still considered valid in international law today. However, they both place much emphasis on progressive action over a period of time, rather than the immediate criminalization of offenders.

It is only in quite recent times that international criminal lawsuits have been pursued against individuals for the offence of slavery or “enslavement”. A watershed was the adoption of the Rome Statute for the International Criminal Court in July 1998, which established the International Criminal Court. Enslavement is considered as a crime against humanity which falls within the Court’s jurisdiction. Interestingly, the Rome Statute’s definition brings together the concepts of enslavement and human trafficking. Article 7 defines enslavement as “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”.

## Legal instruments of the 1950s

The second major period of international standard setting comes after the Second World War, in the 1950s. Two very different factors underlie the second round of standard setting, by the UN and the ILO respectively. One was the challenge of deeply embedded servile and slavery-like practices, facing developing and newly independent countries which were breaking free from colonialism, and seeking to reform their agrarian and labour system accordingly. The second was the mass imposition of forced labour for the State mainly for ideological and political purposes, in the context of the Cold War.

The former issues affected many millions of poor farmers and their families, throughout the developing world. The problems were most endemic in Asia and Latin America. And as many countries embarked on redistributive land and tenancy reforms,

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5 N. Valticos: *International Labour Law*, Kluwer, Deventer, The Netherlands 1979, p.98.

6 These include: any work or service exacted in virtue of compulsory military service laws for work of a purely military character; any work or services which forms part of normal civic obligations; work or service exacted as a consequence of a conviction in a court of law (provided that this is carried out under the supervision and control of a public authority, and that the prisoner is not hired to or placed at the disposal of private individuals, companies or associations); any work or service exacted in cases of emergency; and minor communal services (provided that members of the community or their representatives are consulted on the need for them).

7 The 2014 ILO Protocol on Forced Labour now formally removes these transitional provisions from Convention No. 29.

there was a new momentum to eradicate the servile labour systems that had been so widespread. In 1955 the UN Economic and Social Council appointed a Committee to draft a supplementary convention, to deal with practices resembling slavery not covered by the 1926 Slavery Convention itself. The instrument was drafted quite quickly, and in September 1956 a Conference of Plenipotentiaries adopted a Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.

The 1956 UN Convention has separate sections on: institutions and practices similar to slavery; the slave trade; and slavery and institutions and practices similar to slavery. One purpose is to clarify the concept of “institutions and practices similar to slavery”. These include: debt bondage; serfdom; forced marriage; and institutions where a child or young person under 18 years of age is delivered by parents or guardians to another person with a view to exploitation. Of these practices, debt bondage is defined as “the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of these services are not respectively limited and defined”. Serfdom is “the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status”.

For both the slave trade and institutions and practices similar to slavery, the Supplementary Convention emphasizes the importance of criminalization. Article 3 provides that conveying slaves, or being an accessory thereto, shall be a criminal offence under the laws of the States Parties to the Convention, and persons convicted thereof shall be liable to very severe penalties. Though the language is more nuanced, the implications are that criminal penalties should also be applied to the persons responsible for debt bondage or maintaining persons in serfdom. It is nevertheless accepted that the eradication of these practices can only be achieved over time through necessary legislative and other measures.

While the concerns of the UN Supplementary Convention were essentially with slavery-like practices in the private economy, new ILO standard setting was concerned with forced labour exacted by the State. During and after the Second World War, attention was increasingly drawn to systems of forced labour used as a means of political coercion. In 1951 the UN and ILO jointly created an Ad Hoc Committee on Forced Labour, which pointed to the existence of serious forms of forced labour as a means of political coercion or for economic purposes. This paved the way for the ILO’s Abolition of Forced Labour Convention, 1957 (No. 105), which called for the immediate and complete abolition of forced labour for the following five purposes: (a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system (b) as a method of mobilising and using labour for purposes of economic development (c) as a means of labour discipline (d) as a punishment for having participated in strikes, and (e) as a means of racial, social, national or religious discrimination.

## 2000 and beyond. International law and human trafficking

International action against human trafficking has a lengthy history. A number of instruments were adopted in the early twentieth century. An International Agreement for the Suppression of the White Slave Traffic was adopted in 1904, mainly by European countries, and was followed by an international Convention on the same subject in 1910. Further treaties on the subject were adopted by the League of Nations in 1921 and 1933.

In 1949, the UN adopted its Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others. In this instrument, trafficking is essentially equated with the exploitation of prostitution. Acts such as brothel keeping are punishable offences under the Convention, regardless of age or consent. The momentum to develop a contemporary instrument against human trafficking gathered pace in the late 1990s. In December 1998 the UN General Assembly established an ad-hoc inter-governmental committee to develop a new international legal instrument to address transnational organized crime. As one expert observes, “it is the sovereignty/security issues surrounding trafficking and migrant smuggling which are the true driving force behind such efforts. Wealthy states are increasingly concerned that the actions of traffickers and migrant smugglers interfere with orderly migration and facilitate the circumvention of national immigration restrictions.”<sup>8</sup> As another expert similarly observes, “The Protocol was developed in a context of governments’ fear about the rapid growth and power of organised crime worldwide, rather than a particular concern about women in prostitution or slavery-like practices and forced labour...” and therefore destination countries “were fearful about growing irregular migration as a direct result of the involvement of organised criminal networks, and the inability of current national laws to control such irregular migration”.<sup>9</sup>

The Trafficking Protocol was certainly adopted at a very particular era of the end of millennium. It came after decades of extensive liberalization of financial and labour markets, notably in the developed countries, and also land and other markets in developing countries. It also came at a time of growing international migration, following the relaxation of border controls, particularly in the former Communist bloc, and when these substantial flows of both irregular and regular migrant labour were fuelling concerns about national security and cultural cohesion in the wealthier countries. Thus in both the political context, and the institutional context in which it was adopted, the Trafficking Protocol can be seen as an instrument heavily influenced by the principles of crime control and prevention, border control and security.

At the same time, the Trafficking Protocol was heavily influenced by non-governmental organizations (NGOs) of different persuasions, and by inter-governmental organizations with a mandate on human rights and labour concerns, which participated in the preparatory sessions. Above all the Protocol has prepared the ground for the integrated approach against human trafficking, involving the three pillars of protection, prevention and prosecution, as well as stressing the importance of international cooperation.

While the Protocol’s definition of “trafficking in persons” is highly complex, it involves a range of acts and means used for the purpose of exploiting vulnerable persons. At its simplest, this can be labour or sexual exploitation, or for the removal of organs. The concept of exploitation is not strictly defined as such. Instead, the definitional article indicates of what it should consist at a minimum. In the area that has generally come to be known as trafficking for labour exploitation, this includes forced labour or services, slavery or practices similar to slavery and servitude.

Since the Trafficking Protocol entered into force in late 2003, there has now been a decade of experience. It has been the basic model, on the basis of which individual countries have adopted or amended specific anti-trafficking laws, or inserted provisions against human trafficking in either their criminal laws or other pertinent legislation. In the early years, the emphasis in many countries was on the criminalization of trafficking for sexual exploitation, and in many cases on measures of protection for victims. There has since been steadily more attention to labour trafficking, and most countries now cover this aspect in their laws, policies and action plans and institutional mechanisms.

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<sup>8</sup> Anne Gallagher, “Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis”, in *Human Rights Quarterly*, Vol. 23, No. 4, November 2001, p. 976.

<sup>9</sup> Elaine Pearson, “Historical Development of Trafficking: the Legal Framework for Anti-Trafficking Interventions” in *Challenging Trafficking in Persons: Theoretical Debate and Practical Approaches* (Nomos, GTZ, German Federal Ministry for Economic Cooperation and Development, 2005), p. 23.

## The 2014 ILO Protocol and Recommendation on Forced Labour

The new ILO instruments are of importance in that, without in any way altering the basic definition of forced labour, they lay emphasis on the need for integrated action against forced labour – including the forced labour that results from human trafficking – with full respect for the human rights of the offended persons or victims. Thus they build on the framework earlier developed in the Trafficking Protocol, with its emphasis on prevention and protection as well as prosecution, now applying this to all instances or victims of forced labour. There is ample reference to remedies and compensation, to improved protection for vulnerable migrant workers, and to the principle that persons should not be prosecuted for crimes that they were forced to commit. The new instruments also lay stress on the vital role to be played by labour inspectorates and administrations, in action against all forms of forced labour.



# 3

## Slavery, institutions and practices similar to slavery, forced labour, human trafficking and exploitation: Applying the concepts to the modern world

There have been some heated debates, perhaps most notably among academics, as to the implications of the terminology used. One scholar has argued for instance that “the Trafficking Protocol has enabled governments to hive off a tiny part of the global problem of slavery as the focus of international attention and resources, leaving the overwhelming majority of slaves to depend on largely irrelevant and ineffective supervisory structures”.<sup>10</sup> In a rejoinder, anti-trafficking expert Anne Gallagher has argued that “far from damaging human rights, the issue of trafficking provides unprecedented opportunities for the renewal and growth of a legal system that, until recently, has offered only platitudes and the illusion of legal protection to the millions of individuals whose life and labour is exploited for private profit”.<sup>11</sup>

But in such discussions about terminology, there is always a risk of asking the wrong questions. Is slavery the most serious of all the offences, for which the heaviest criminal penalties should be applied against the offender? Is forced labour a sub-set of slavery, or even vice-versa? Can the offence of human trafficking be considered to cover all forms of forced labour (thus making it immaterial whether or not there has been movement, or the involvement of a recruiting agent separate from the end-use employer)? Should even human trafficking be considered a form of slavery?

In addition to examining the different concepts themselves, it can also be useful to develop a typology of the main forms of coercion or severe exploitation in different countries, and to examine the way that these can be addressed most effectively through different kinds of law and policy response. A starting point for such a typology, building on those developed by the ILO over the past decade, could be something like this:

- *Coercion exacted by the State*
- *Coercion in conflict situations*
- *Longstanding problems of coercion, linked to poverty and discrimination, and deeply embedded in the agrarian and social structures and culture of many developing countries*
- *Structural concerns, linked to contemporary globalization, including issues linked to migration, labour market issues including the role of recruitment intermediaries, and the role of the private sector in eradicating coercion from business practices and company supply chains*

These four categories are approximate, and could doubtless be refined and built upon. But they are a starting point for analysing the usefulness or relevance of the different concepts in addressing the various concerns in practice.

<sup>10</sup> James T. Hathaway, The Human Rights Quagmire of “Human Trafficking”, in *Virginia Journal of International Law*, Vol. 49:1, (2008).

<sup>11</sup> Anne T. Gallagher. “Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway”, in *Virginia Journal of International Law*, Vol. 49:4, (2009): 789-848.

## Forced labour exacted by the State

Whatever the terminology used, it makes little practical sense to suggest that these are concerns of slavery or slavery-like practices, and least of all human trafficking. The term “slave labour camps” may have been widely used in the past. And activists may wish for campaigning purposes to refer to something like a “slave holding State”. But the main issue, when there is evidence of widespread forced labour exacted by the State, is to place pressure on it to reform systematic practices rather than seek to prosecute any individual or groups for a specific criminal offence. This can be through such mechanisms as ILO Commissions of Inquiry (of which the highest profile in recent time concerned systemic forced labour in Myanmar) and through international efforts to have trade and other sanctions imposed unless a government reforms its practices.

On this subject, there will also be contentious areas. Perhaps the most difficult has been the circumstances in which prisoners or detainees can be compelled to work. There have been extensive comments by the ILO supervisory bodies under the relevant provisions of its first Forced Labour Convention. Much of this has concerned the present situation in industrialized countries, when either part of the prison system has been privatized, or prisoners after sentencing have been placed at the disposal of private companies. A further concern has been China’s “re-education through labour” system (recently reformed by law in late 2013) in which persons subject to administrative detention have been compelled to work. In all cases, however, the reference point for analysis and recommendations has to be the relevant provisions of the ILO instruments on forced and compulsory labour, and subsequent observations by the ILO supervisory bodies. Little can be gained by seeking to address such concerns by reference to other international instruments.

## Coercion in conflict situations

The most serious abuses of coercion have often occurred in conflict situations. They may be perpetrated by rebel groups, or by armed groups serving the interests of the ruling government. Perhaps the most cited cases have been *Prosecutor v. Kunarac*, in which defendants were charged with the crime of enslavement for keeping two girls in a house and treating them as personal property. The Trial Chamber was required to determine the meaning of enslavement as a crime against humanity under the relevant Article 5(c) of the Statute of the Court. After reviewing the relevant international instruments on slavery and forced labour, and other applicable law, it ruled that enslavement as a crime in customary international law consisted of the “exercise of any or all of the powers attaching to the right of ownership over a person”. A subsequent Appeals Chamber accepted this definition, though drawing some distinctions between the “chattel slavery” covered by the 1926 Slavery Convention, and the contemporary forms of slavery, in which there was a “lesser degree” of destruction of the juridical personality.<sup>12</sup>

Notably in Africa, enslavement and abductions have been a feature of recent conflicts. Given the way that the victims have been forcibly abducted or kidnapped, and kept under the control of another person, it is reasonable to depict such abuses as slavery in the sense of the 1926 Convention. There has to date been a limited number of prosecutions for this crime in post-conflict situations. Examples are some cases of the Special Court for Sierra Leone, especially with regard to sexual slavery offences.

## Longstanding coercion linked to poverty and discrimination

Problems of this kind have been endemic throughout Africa, Asia and Latin America. Once again, it makes very little practical sense to address these concerns under the heading of *human trafficking* (although the US Department of State has chosen to do so in its recent annual reports on the subject), because there is a need to focus on the underlying structural concerns rather

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<sup>12</sup> See *Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T (Int’l Crim. Trib. for the Former Yugoslavia, Trial Chamber, 22 Feb. 2001), para. 539; and Case No. IT 96-23 & IT-96-23/1-A (Int’l Crim. Trib. for the Former Yugoslavia, Appeals Chamber, 12 June 2002), para. 117.

than the abusive conduct of certain individuals. Though there will always be extreme cases where governments and prosecutors should reserve the right to pursue criminal law enforcement against the worst offenders, these are clear examples of the need to maintain the appropriate balance between the “systemic” and “individual” approaches. Action against a small number of individuals will have limited impact, unless there are concerted efforts to address the systemic concerns through a range of economic, social and cultural development policies, including compensatory financial programmes and redistributive reforms.

The laws, policies and programmes of the Indian subcontinent (India, Nepal and Pakistan) generally address these concerns under the headings of *bonded labour* and *bonded labour systems*. African countries such as Mauritania and Niger, which have a long legacy of enslavement of certain minority groups by their “masters”, now refer to the vestiges or legacy of slavery. In Latin America, there have at least until recently been pockets of agrarian serfdom on the large estates of certain countries, in areas which escaped the post-war redistributive agrarian reforms. Many terms are used in Spanish, such as *peones acasillados* in the Mexican state of Chiapas, or *mozos colonos* in some highland regions of Guatemala. For the most part, however, the main problems in rural Latin America appear to be the debt bondage affecting indigenous peoples of the continent, who are recruited in their own remote regions or transported to areas of new commercial development, for such tasks as harvesting, logging, forest clearing and cattle-ranching.

The Latin American case which has persistently received most international attention has been the *slave labour* affecting poor migrants of north-eastern states of Brazil, who have been deceived by recruiting agents popularly known as *gatos*, and then subjected to appalling treatment for little or no pay in remote parts of the Amazon region. Brazil has an innovative concept of *trabalho escravo* or “slave labour”, aiming to capture both coercive forms of labour exploitation and extreme sub-standard living and working conditions. The concept is defined in Section 149 of Brazil’s 2003 Criminal Code as “Reducing someone to a condition analogous to a slave, namely: subjecting a person to forced labour or to arduous working days, or subjecting such a person to degrading working conditions or restricting, in any manner whatsoever, his mobility by reason of a debt contracted in respect of the employer or a representative of that employer”. The Brazilian definition thus seeks to embrace a variety of concepts: forced labour, slavery-like practices, debt bondage, abusive recruitment and degrading working conditions that do *not necessarily* emanate from coercion. Implementation of the law has led to very few criminal prosecutions. But it has resulted in the imposition of heavy fines against landowners considered to have subjected their workers to degrading conditions, as well as the release of over 46,000 workers between 1995-2013.

For Asian laws against bonded labour systems the key feature is debt bondage, though the definitions are lengthy and complex. At their simplest, bonded labour systems are those where workers provide work or services to a landlord or employer in exchange for a monetary advance, and incur restrictions on their freedom of movement or occupation until this debt has been worked off. The debtors mortgage the services of themselves and/or their family members for a specified or indeterminate period, with or without wages, and are effectively bonded to the creditor or employer during this period. The bondage may be of short duration: alternatively, it may last for several years, or even a lifetime. In extreme cases the debts can be inherited by children, and the bondage becomes inter-generational.

The first national law against bonded labour was enacted in India in 1976, almost three decades after independence. It essentially defined bonded labour in the terms as above. It also established penalties for the exaction of bonded labour, and set out the modalities for monitoring and implementation, which rest mainly with the state governments. Pakistan’s federal act against bonded labour was enacted sixteen years later in 1992, followed by

regulations on the subject in 1995. The Pakistan federal act is largely based on the Indian law, establishing penalties for the enforcement or exaction of bonded labour, for the omission or failure to restore possession of property to the bonded labourer, and for abetting an offence. The act also provides for vigilance committees at the district level, to advise on implementation of the law, help in rehabilitation of freed bonded labourers, monitor implementation of the law, and provide bonded labourers with the necessary assistance.

Almost a decade later, Nepal adopted its first law on the subject. In mid-2000, the Government of Nepal declared the immediate abolition of a form of bonded labour known as the *kamaiya* system, which bonded ethnic minority groups to traditional landlords. The *kamaiya* Labour (Prohibition) Act was later enacted in 2002, setting the stage for a largely land-based programme of rehabilitation.

While the laws are in place, containing a basic definition of bonded labour, there have been extensive debates in the academic and policy literature concerning their scope and forms. In India for example, the scope of bonded labour was addressed by several judgments of the Supreme Court in the early 1980s. It ruled that any persons working for “nominal wages” (defined as less than the statutory minimum wage) were acting under the force of some coercion compelling them to work for less than their legal entitlement. By linking the concept of bonded labour to the non-payment of the legal minimum wage, such jurisprudence allows for a considerable expansion of those persons who might be considered as bonded labourers under the 1976 act itself.

In more recent times, attention to bonded labour appears to have resurfaced. There has been significant support from international donors for grass roots action by NGOs, as well as some focus by microfinance institutions. The governments of India and Pakistan have also begun to re-examine their policies, and to discuss whether the earlier legislation is appropriate for addressing present-day concerns. Inevitably, this has led to a focus on definitions. For example, a 2012 advisory report to the Government of India<sup>13</sup> raises a number of issues with regard to both the definition and scope of the offences defined in the earlier bonded labour act. It points to the “negligible rates of prosecution” over some 35 years since the law was first adopted, observing that employers of bonded labour have almost never been prosecuted or punished, and that official activism in freeing and rehabilitating bonded labourers has had very limited effect. The review suggests that it may be useful to think in terms of “graded punishments”, with mere enforcement of bonded labour or bonded debt “inviting hefty fines without imprisonment”, whereas “exacting bonded labour under threat of injury, social or cultural humiliation “ought to invite stronger penal sanctions than currently envisaged under law”.

The same kind of analysis could be extended to the other south Asian countries, and also to the African countries with a legacy of slavery and a continued widespread existence of “slavery-like practices”. In the Asian region, it could be argued that law enforcement results have been negligible because it has failed to distinguish between what might be conceived of as the more “benign” forms of indebtedness, in which employer advances can perform a social function in the absence of alternative forms of credit for impoverished workers; and the more pernicious forms of bonded labour, often involving violence, which clearly need to be addressed through criminal law and sanctions.

In such African countries as Mauritania, there have been repeated initiatives since the early 1980s to abolish slavery by law. Most recently, slavery in Mauritania is prohibited by Law 2007-048 of September 2007, which provides for a penalty of between five to ten years imprisonment, but has barely been enforced. In the meantime, in March 2013 the President of Mauritania established a new “National Agency to Fight against the Vestiges of Slavery, Integration, and Fight against Poverty”. The NGO Walk Free, in its first Global Index on Slavery launched in October 2013, identified Mauritania as the

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13 “Bonded Labour System Abolition Act, 1976: Review of Law and Implementation”, unpublished report prepared for Working Group on Social Protection, National Advisory Council, 2012.

“worst offender” at the top of the index, urged that all slavery cases be investigated and prosecuted, but at the same time stressed that existing poverty reduction programmes should include a focus on enabling enslaved people and former slaves to become independent from their former masters.

In all these cases it is a question of nuance. There will always be arguments for high profile prosecutions against the worst offenders, and it is important that the law leaves space for this. The use of the term *slavery* in Mauritania’s law is important in this sense, in keeping open the options for criminal prosecutions and high sentences. And in the Asian cases, it is important that the term *bonded labour* should not be associated too much with its more “benign” aspects that can be explained away as mutual economic benefit between the bonded and the bondholder. The option for criminal prosecution must again be left open, to attack and punish the worst cases. But many examples of the institutions and practices similar to slavery are deeply embedded in complex social, cultural and economic fabrics. A main goal should be to ensure that the eradication of these practices is a strategic objective of all anti-poverty and development policies and programmes. The use of terminology should be understood in this light.

## Structural concerns and the modern global economy

It is often asserted that most coercion and abuse today exists in the private economy.<sup>14</sup> Worldwide, there have been growing concerns to address forced labour, slavery or human trafficking in company supply chains. Increasingly, the spotlight has been on major companies, as much as on the smaller enterprises in the informal economy of developing countries. Advocacy groups are placing more pressure on these companies to report on their supply chain management, and to ensure that their often complex supply chains are free of coercive practices.

It is important to understand that state policies can create the conditions, which permit these practices to flourish. These are again structural concerns, which can be seen as more recent than the age-old problems discussed in the previous section. Abusive forms of official migration management, such as the indentured labour systems used during the British colonial administration, have a long history. But inadequate forms and systems of migration management, which place a number of restrictions on the freedom of the migrant or temporary workers, have contributed to serious exploitation in more recent times.

A particular spotlight has been on the *Kafeel* or “sponsorship” systems widely used in the Gulf States, which effectively tie workers to one employer under pain of penalty if the worker seeks to abscond. A number of ILO and other reports have documented the abuses to which this system can give rise. But it has become clear that temporary work schemes for the importation of foreign workers for a fixed period of time similarly bond the workers to one employer in a number of Western countries. Abuses have been particularly likely, when the foreign workers are brought in through unscrupulous recruitment agencies which overcharge for their services in their country of origin; and which in some cases may exercise continuing control over the workers at the place of destination.

In some cases, the serious abuses associated with these practices may be captured through criminal law and its enforcement. An example is the 2008 amendment to anti-trafficking legislation in the United States, which introduced a new criminal offence of fraud in foreign labour contracting. The first persons prosecuted under this provision were in fact members of Thai and US recruitment agencies, who had brought in the workers under the official US scheme for importing foreign workers.<sup>15</sup>

<sup>14</sup> See, e.g., B. Andrees and P. Belser (eds.), *Forced Labor: Coercion and Exploitation in the Private Economy* (Geneva, Lynne Rienner Publishers, 2009).

<sup>15</sup> Reported on US Department of Justice website. [www.justice.gov](http://www.justice.gov).

Systemic practices facilitated by state law and policies, which risk causing serious abuse, can also become engrained in cultural attitudes. An example is the withholding of identity documents, often seen as a serious indicator of forced labour and trafficking. Yet many households in Saudi Arabia and other Gulf States have long tended to hold identity documents of their domestic workers, as indeed have a number of construction companies throughout the Gulf region.

Addressing such practices needs constant awareness raising, based on carefully documented research and case studies, rather than any expectation that one can go through the route of criminal or even labour justice. It may be a lengthy process, with a need to involve government agencies, employers, legislators, the media and other interest groups. Particular sporting or other events, such as the Qatar 2022 World Cup, provide the opportunity for advocacy groups to focus on the workers who can be most exposed to exploitation, such as the Nepali workers in Qatar's booming construction industry. In such cases the terminology used (whether slavery, forced labour or human trafficking) may be of less importance than the overall strategic objective. This is to radically raise awareness; and prepare the groups for a series of labour market measures and policies to introduce labour inspection and monitoring, establish grievance procedures and ultimately give the workers genuine forms of representation to protect their labour rights.

Labour brokers and intermediaries of different types also bear much responsibility for the coercion and exploitation of contracted workers in the modern global economy, whether in industrialized or developing countries, whether within or across national borders.

When these agents treat vulnerable people with force, fraud or deception in order to make unfair profits at their expense, it is easiest to conceptualize these concerns as those of human trafficking. Indeed, it can be argued that the capacity to focus on means and process as well as the purpose or end result of exploitation is the *only way* in which the discourse of human trafficking adds real value to the existing concepts of forced labour, slavery and slavery-like practices. While they are all serious crimes, a focus on trafficking can address the various ways along the cycle in which the victim ends up in a situation of exploitation, and thus involve a particular emphasis on recruitment and recruitment agencies, and also the involvement of organized crime syndicates.

A problem, however, is that it can be difficult to draw hard and fast distinctions between lawful and unlawful practices. It is now widely accepted that migrant workers with lawful contracts of employment in a destination country can be exposed to human trafficking, as well as those in an unlawful situation. Examples of this can be contract substitution, when the contract in the destination workplace varies considerably from that signed in a country of origin, thus resulting in less remuneration and perhaps poorer living and working conditions. These are classic examples of fraud and deception, which some anti-trafficking laws are now trying to capture. The most difficult issue is that of fee-charging by recruitment agencies, or the way that unexplained deductions may be made from wages ostensibly for repayment of advances.

On this matter, the main issue seems to be the overlap between manifest coercion and unlawful practices on the one hand; and "creeping forms of exploitation" on the other. A rigorous examination of the factors behind the fee-charging and other practices, widely perceived as exploitative, can prepare the ground for new legislation which may tighten regulations for recruitment agencies, and perhaps ultimately criminalize certain practices which have so far evaded any sanctions.

Efforts to engage the private sector can be voluntary and even business-led initiatives, such as persuading individual companies to sign up to certain principles. In 2010 the International Organisation of Employers issued its own policy on forced labour and why it is an issue for employers. And the entry into force in early 2012 of California's Transparency in Supply Chains Act has led to a significant increase in reporting by major companies on their initiatives and programmes to eradicate abuses from their company activities and supply chains.

There are indications that major companies will be increasingly in the spotlight over their supply chain management; and that international organizations, NGOs and also governments will make greater efforts to engage with them on the subject. In this case, business actors will want maximum clarity on the subject and clear guidance. What activities are most at risk, and what can be done to reduce this risk? What practices can make companies liable to criminal conduct? Under what circumstances should they disengage immediately from suppliers? Alternatively, when should they seek to remediate the problems? How can they secure a level playing field, through clear rules of conduct for recruiting intermediaries? As more and more companies are now engaging external auditors, when they are subject to criticism, there is also a need for a consistent approach by auditors.

The use of different terms can be confusing for business. They have been used to incorporating provisions against forced labour in their company codes of conduct, perhaps guided by the forced labour provisions of the UN Global Compact. They may now have to report on human trafficking, perhaps even slavery. The most important thing, however, is to overcome business perceptions that the payment of low wages can be the same thing as forced labour or slavery.

The “grey areas” of exploitation will always pose challenges in engaging with business. A clear example is excessive fee-charging by recruiters and subcontractors. It is widely known that excessive fee-charging of vulnerable workers, particularly if they borrow to pay these fees, is one of the main factors that can drive them into subsequent debt-bondage. Certain major companies, when criticised on this aspect of their suppliers’ conduct, have sought to place a cap on such fee-charging.

In summary, the terminology is not in itself likely to be an issue of major importance for the business world. In their codes of conduct, it is easy for companies to express zero tolerance for all these forms of coercion and to commit themselves to eradicating them from their company activities and supply chains. Companies are mainly concerned by negative publicity, and above all by the prospect of litigation. But there are many areas where legislation is required, to address the unscrupulous practices which are on the borderline with unlawful forms of coercion. Employers need to be at the table with governments and trade unions, to negotiate common standards for this level playing field.



# 4

## When does terminology matter? Final reflections

We can now return to the basic questions. When and in what circumstances does terminology matter?

The distinctions drawn earlier between *individual* and *systemic* forms of abuse can be a starting point for analysis. At one level, the purpose of legislating on the concerns of slavery, forced labour and human trafficking is to pave the way for effective criminal law enforcement. It is important to have maximum clarity on the nature of specific offences, so that clear guidance can be given to police, labour inspectors and prosecutors. It is also important to differentiate as much as possible between the degree of gravity of these offences, a matter of considerable importance to judges. And it is similarly important to identify the victims of such abuses, setting out the forms of protection, remedies and compensation to which they may be entitled, together with the mechanisms for obtaining such compensation.

At another level legislation, and advocacy for such legislation, is seeking to tackle systemic abuses. This can be action against longstanding forms of abuse, such as the nineteenth century global movement against the slave trade, or the more contemporary movement against bonded labour systems in particularly the South Asian region. It can also be preventive action against the new forms of abuse that are now permeating migration systems and labour markets worldwide.

The past decade has seen a remarkable growth of international, regional and national momentum against these various forms of coercive abuse. Above all there has been extensive national legislation against all forms of human trafficking, together with national and regional action plans, task forces and other coordination mechanisms. In some but fewer cases, there has been new national legislation against forced labour, and new coordination mechanisms such as national commissions on the subject. The South Asian countries have also been revisiting their earlier laws and policies on bonded labour systems, seeking to adapt them more effectively to contemporary challenges. And in the midst of all these efforts, there has been something of a trend to use the discourse of *modern slavery* as an umbrella term for the various forms of abuse.

For the most serious cases of abuse, which deserve and require criminal prosecution and convictions, there will be continued debates as to whether these should best be addressed as *forced labour* or *human trafficking*. On this point, the best solution is to follow countries like Australia and the United Kingdom, which have now legislated against both. As the ILO has itself observed, the impetus for new anti-trafficking laws should not be a reason for not legislating against forced labour as a specific criminal offence. And as has been persuasively argued in ILO reports, “by no means all the forced labour practices to which even migrant workers are subjected in

destination countries are necessarily a result of trafficking”. Moreover, “not only migrants are the victims of forced labour in the destination countries. There is therefore a need for laws against both forced labour and trafficking.”<sup>16</sup>

Whatever the terminology used in criminal law, or in anti-trafficking laws and statutes, it is a well-known fact that criminal law enforcement barely scratches the surface of the problems. The ILO quite recently revised its earlier global estimates of persons subjected to forced labour at any moment of time over the past decade, from 12.3 million in 2005 to 20.9 million in 2012.<sup>17</sup> A further widely cited estimate, issued the following year by the Australia-based Walk Free Foundation, was of 29.8 million people in modern slavery worldwide.<sup>18</sup> Though these are estimates with a margin of error, they point to a massive problem in terms of the numbers affected, and also affecting in different ways all parts of the world in developed and developing countries alike. And yet, compared with these estimates, available global law enforcement statistics have identified a very small number of prosecutions and convictions. For the past several years, the US Government has compiled global law enforcement data on human trafficking in its annual “Trafficking in Persons Report”. The most recent figures for 2013 were: 44,758 victims identified worldwide; 9,460 prosecutions worldwide (of which 1,199 were for labour trafficking); and 5,776 convictions worldwide (of which 470 were for labour trafficking).<sup>19</sup>

While there is pressure to step up criminal law enforcement, this is cause for serious reflection. In dealing with the various indicators of forced labour, human trafficking, slavery or slavery-like practices, it is essential to know when to go down the route of criminal law enforcement; and when to seek other remedies for punishment of offenders, and protection of and assistance to these persons offended. It is also important to understand that criminal justice, labour justice and other forms of justice can complement each other.

And as observed earlier, the most difficult concept to address from any viewpoint of justice is that of *exploitation* or *labour exploitation*. Legislators and judges are clearly struggling to address this concern, and some different approaches have been summarized earlier in this paper. Perhaps one advantage of the *modern slavery* term is that it can help focus the minds of legislators and policy analysts on the broader dimensions of abuse in global labour markets today. This is also where the concept of the *continuum* is important. At one end of the spectrum there are the blatant cases of slavery and forced labour, where the coercion is clearly evident. In the middle of the spectrum are the “greyer areas” where there is evidence of some denial of freedom in the employment relationship, perhaps as a result of fraudulent or deceptive recruitment practices.

Further throughout the spectrum are the manifold situations where migrant workers, or other precarious workers without regular contracts of employment, are exposed to arduous living and working conditions, and remuneration way below the national average or minimum wage, but without any clear evidence of coercion. These are growing concerns throughout the world, and they are threatening the application of labour rights that have been fought for over a long period of time. The concerns are rightly being addressed from the perspective of *labour exploitation*. It is important that the minds of legislators and policy makers should be focused on the shortcomings of unfair recruitment systems, so they can address the legal loopholes, and prepare the ground for penalizing abusive practices.

It is always going to be difficult when to apply criminal sanctions against the various forms of abuse and perceived labour exploitation, and when to go down the route of labour justice, or even to use the complementary approaches of criminal and labour justice. But it is important never to lose vision as to what the various concepts stand for. Whatever their causes and contexts, forced labour, slavery and human trafficking are serious crimes. They need to be tackled through comprehensive

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16 See, e.g., ILO: *A Global Alliance against Forced Labour*, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report I(B), International Labour Conference, 93rd Session, 2005, para. 23.

17 ILO: *ILO Global Estimate of Forced Labour: Results and Methodology*, Special Action Programme to Combat Forced Labour, 2012.

18 Walk Free Foundation: *The Global Slavery Index 2013*, [www.globalsslaveryindex.org](http://www.globalsslaveryindex.org).

19 US Department of State: *Trafficking in Persons Report* (Washington, D.C., June 2013), p. 45.

strategies, well thought out prevention and labour market governance, enhanced protection for and assistance to the victims. But at the end of the day they are crimes, and must be dealt with as such.

Slavery-like systems, and to a large extent the concept of exploitation, need to be seen and understood differently. The former are mainly systemic problems, often with complex socio-cultural underpinnings. State policies need to reserve the option of criminal law enforcement in the worst cases, but must understand that major social reforms together with massive awareness campaigns are usually needed to eradicate these systemic problems at their root. The “human trafficking” and “modern slavery” discourse have also served to bring much needed attention to the widespread problems now affecting migrants and other vulnerable workers, often linked to wider issues of discrimination, and inadequacies in migration and asylum policies, or systems of social protection.

These are arguments against attempting to define a term like “modern slavery”, in national law or an international instrument. The four existing definitions of coercion, in the rather different international instruments, are sound enough. What really matters is the question of emphasis, on individual offenders or systemic concerns; and the instruments and policy measures which are used to address these older or newer forms of coercion.

In this sense it is a highly positive thing that the “trafficking discourse”, which commenced over a decade ago with its narrower focus on the sexual exploitation of women and children in the context of criminal justice, has actually fuelled some provocative research and policy debates about what constitutes labour exploitation. These are healthy and necessary debates. And it is perfectly conceivable that, as a reaction against the strong deregulation that has affected the labour markets of many countries in recent times, they will pave the way for new laws and policies that involve tighter regulation, monitoring and supervision of the labour brokers who are so often at the root of the problem.

But one must never lose sight of the fact that between 20 and 30 million human beings today are subjected to the most serious forms of coercion, and the liberation of these persons must be a topmost priority. Time should not be spent in seeking an exact consensus over definitions. It is more important to reach agreement on how best to tackle the unfinished business, and to stand up to the challenges ahead.

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