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Forced Labour, Slavery and Human Trafficking: When do definitions matter?

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We can spend a lot of time debating the connections or essential differences between the concepts of trafficking, forced labour, slavery and modern slavery, or slavery-like practices. Some insist that trafficking is a subset of forced labour, others the reverse. The arguments between academics, bureaucracies and even government agencies have often been vitriolic.

But we really need to sift out the important issues from the trivial, and from the self-interests of certain agencies in pushing their own agenda or ideology. I would suggest that the main issues at stake are as follows:

Is the presence of coercion a necessary condition for articulating the offence of human trafficking, whether for sexual or labour exploitation?

To what extent should law enforcement responses focus on criminal justice, or on other remedies including in particular the application of labour justice?

To what extent can these abusive practices be dealt with using action based on individuals, either law enforcement against the perpetrators, or the protection and compensation of the persons wronged? And to what extent are these systemic practices, perhaps deeply embedded in the norms and values of any society, requiring a response that goes way beyond law enforcement?

Related to this, to what extent are we talking about longstanding systemic abuses, deriving from a long history of discrimination against vulnerable groups? And to what extent are there new systemic patterns of abuse, mainly linked to contemporary globalisation?

It is also important to understand the context in which the main international instrument against human trafficking[1] was adopted. The period after the 1980s saw strong pressures for deregulation, led by the international financial institutions and the erosion of social protection systems for vulnerable people. This was the period of the break up of the former Communist bloc, opening of borders and mass international movement of people, particularly women, to seek new opportunities. There was also an extraordinary mismatch between the economic policies of many wealthier countries, seeking to attract migrant workers at the bottom end and often unregulated sector of the labour market, and border control policies which were concerned with stemming the flow of people. These systemic inequalities inevitably led to the trafficking of women and also men, much of it through labour brokers and unscrupulous recruitment agencies operating in both sender and destination countries.

The Trafficking Protocol, and the inherent tensions within it, needs to be understood in this light. It is by definition an international instrument on law enforcement, being part of a wider United Nations (UN) instrument on Transnational Organized Crime. At the same time its drafting was strongly influenced by human rights advocacy groups, and by UN and other international agencies concerned with human rights, social and labour protection. It therefore combines the famous 'three Ps' of prevention, protection and prosecution (together with partnership and international cooperation) going considerably beyond the confines of a traditional instrument on law enforcement.

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1 United Nations General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, (Trafficking Protocol).

Furthermore, the Trafficking Protocol focuses on the purpose of human trafficking, namely for the purpose of exploitation. This is a difficult concept, certainly never defined in international law, and subject to a variety of interpretations. Common sense indicates that people are exploited when they are treated unfairly, when they do not receive a fair reward (for example, as set out in minimum wage laws for their work or service), and when the 'exploiters' take advantage of their vulnerability to extract unfair profits. But where should we draw lines when there are obvious gradations of such exploitation?

In the first years after the entry into force of the Trafficking Protocol in 2003, the predominant emphasis was on trafficking for sexual exploitation. Over the decade after that, the emphasis gradually but decisively shifted. Many states recognised a specific criminal offence of trafficking for labour exploitation, and began to beef up their fact finding, investigations and prosecutions in this area. Organisations such as the International Labour Organization developed and refined their indicators, assisting both law enforcement and service providers to identify cases of labour trafficking. Both the UN agencies and specialist non-governmental organisations provided multiple training sessions on the subject, typically trying to bring criminal and labour justice together, and also seeking to reach out to business and worker organisations. A feature of the last few years has been the growing engagement of the business community, persuading them to address forced labour and human trafficking in their company activities and supply chains.

A consensus has emerged that the boundaries of forced labour and labour trafficking are extremely difficult to define. There are a very small number of egregious cases, where the perpetrators are successfully prosecuted and receive heavy convictions (sometimes accompanied by a civil penalty). But the subject is beset by grey and contentious areas, such as the high charges that migrant workers often pay to recruitment agencies, the unexplained deductions from wages that migrants have to put up with, the long hours of work, and the insalubrious living and working conditions. This is often presented as a chain of deception involving subtle forms of coercion that can drive migrants and other vulnerable workers into situations of extreme degradation, arguably amounting to debt bondage.

Because of these ambiguities, and in civil law systems the difficulties of persuading a jury that these subtle forms of coercion and deception can make up the criminal offences of forced labour or labour trafficking, there have been very few successful prosecutions.
When subtle forms of coercion are so difficult to prove before courts, there has been something of a tendency—in both national legislatures and judiciaries—to focus on the objective conditions of exploitation, rather than on the coercive or deceptive means by which people are brought into these conditions. In Europe, when Germany amended its penal code to introduce the specific offence of trafficking for labour exploitation, this was included in the section on 'crimes against personal freedom'. Key indicators of the offence of labour trafficking include 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.

At the wider European level there has been more focus on such objective factors of labour exploitation. There have been growing concerns at the implications for labour rights and standards of 'two-tier labour markets' (one set of standards for nationals, another for migrant workers), and 'atypical forms' of employment such as the posting of workers (employed under the wage and labour regulations of the sending rather than the receiving country), or temporary work programmes for migrants brought in under special visa arrangements.

In individual cases, it will always be difficult to know when to apply criminal or labour sanctions, or a mixture of both. At one end of the continuum, there is a significant if perhaps quite small number of cases that needs to be dealt with through criminal justice. It makes no difference whether they are addressed through the rubric of slavery, forced labour or human trafficking. These are serious crimes in any event under international and most national law and must be treated as such.

Slavery-like systems, and to a large extent the concept of exploitation, need to be understood differently. The former are clearly systemic problems, grounded in a complex legacy of sociocultural factors. The option of criminal law enforcement needs always to be kept open for dealing with the worst cases, but systemic problems need to be addressed at their root through major social, economic and cultural reforms and awareness raising. More recently, the 'anti-trafficking discourse' in its broad sense has served to bring the necessary attention to the manifold abuses now affecting migrants and other vulnerable workers. It has served to highlight wider issues of discrimination together with serious deficiencies in migration and asylum policies.

The future is uncertain. The discourse has fuelled important policy debates, in different national and regional contexts, as to what constitutes labour exploitation and how it should be addressed. As a reaction against the marked deregulation that has affected the labour markets of so many countries in recent decades, this could pave the way for new laws and polices that plug the regulatory gaps, for example securing tighter monitoring and oversight of the unscrupulous labour brokers who are behind too many of the problems.

Nitpicking over precise definitions of the concepts of slavery, forced labour and human trafficking does not address major issue at stake. The real challenge is to understand which of the issues can be addressed effectively through law enforcement against individual offenders; and which issues—whether tackling the unfinished business of traditional slavery-like practices, or coming to grips with the newer problems—can only be addressed through comprehensive social and economic strategies.

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