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Special Issue - Forced Labour and Human Trafficking

Editorial: What's in a Name? Distinguishing forced labour, trafficking and slavery

Trade Unions, Forced Labour and Human Trafficking

Deploying Disclosure Laws to Eliminate Forced Labour: Supply chain transparency efforts of Brazil and the United States of America

Asylum, Immigration Restrictions and Exploitation: Hyper-precarity as a lens for understanding and tackling forced labour

'Tied Visas' and Inadequate Labour Protections: A formula for abuse and exploitation of migrant domestic workers in the United Kingdom

Vulnerability to Forced Labour and Trafficking: The case of Romanian women in the agricultural sector in Sicily

Policy and Practice

The Role of Trade Unions in Reducing Migrant Workers' Vulnerability to Forced Labour and Human Trafficking in the Greater Mekong Subregion

Claiming Space for Labour Rights within the United Kingdom Modern Slavery Crusade

Debate: Should we distinguish between forced labour, trafficking and slavery?

The Challenges and Perils of Reframing Trafficking as 'Modern-Day Slavery'

When it Comes to Modern Slavery, do Definitions Matter?

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

Towards a Cohesive and Contextualised Response: When is it necessary to distinguish between forced labour, trafficking in persons and slavery?

Use of the Term 'Bonded Labour' is a Must in the Context of India

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ANTI-TRAFFICKING REVIEW

Special Issue

FORCED LABOUR AND HUMAN TRAFFICKING

Issue 5 September 2015

The *Anti-Trafficking Review* (ISSN 2286-7511) is published by the Global Alliance Against Traffic in Women (GAATW), a network of over 100 non-governmental organisations worldwide focused on advancing the human rights of migrants, women and trafficked persons.

The *Anti-Trafficking Review* promotes a human rights-based approach to anti-trafficking. It explores trafficking in its broader context including gender analyses and intersections with labour and migrant rights. It offers an outlet and space for dialogue between academics, practitioners, trafficked persons and advocates seeking to communicate new ideas and findings to those working for and with trafficked persons.

The *Review* is open-access and freely available. It is primarily an e-journal, published bi-annually. The journal presents rigorously considered, peer-reviewed material in clear English. Each issue relates to an emerging or overlooked theme in the field of anti-trafficking.

Articles contained in the *Review* represent the views of the respective authors and not necessarily those of the editors, the Editorial Board, the GAATW network or its members. The editorial team reserves the right to edit all articles before publication.

ANTI-TRAFFICKING REVIEW

Issue 5, September 2015

Thematic Articles: Forced Labour and Human Trafficking

Editorial

- 1 What's in a Name? Distinguishing forced labour, trafficking and slavery
Nicola Piper, Marie Segrave and Rebecca Napier-Moore
- 11 Trade Unions, Forced Labour and Human Trafficking
Michele Ford
- 30 Deploying Disclosure Laws to Eliminate Forced Labour: Supply chain transparency efforts of Brazil and the United States of America
Ashley Feasley
- 50 Asylum, Immigration Restrictions and Exploitation: Hyper-precarity as a lens for understanding and tackling forced labour
Hannah Lewis and Louise Waite
- 69 'Tied Visas' and Inadequate Labour Protections: A formula for abuse and exploitation of migrant domestic workers in the United Kingdom
Daphne Demetriou
- 89 Vulnerability to Forced Labour and Trafficking: The case of Romanian women in the agricultural sector in Sicily
Letizia Palumbo and Alessandra Sciarba

Policy and Practice

111 The Role of Trade Unions in Reducing Migrant Workers' Vulnerability to Forced Labour and Human Trafficking in the Greater Mekong Subregion
Eliza Marks and Anna Olsen

129 Claiming Space for Labour Rights within the United Kingdom Modern Slavery Crusade
Caroline Robinson

Debate: Should we distinguish between forced labour, trafficking and slavery?

146 The Challenges and Perils of Reframing Trafficking as 'Modern-Day Slavery'
Janie Chuang

150 When it Comes to Modern Slavery, do Definitions Matter?
Fiona David

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

158 Towards a Cohesive and Contextualised Response: When is it necessary to distinguish between forced labour, trafficking in persons and slavery?
Marja Paavilainen

162 Use of the Term 'Bonded Labour' is a Must in the Context of India
Kiran Kamal Prasad

Editorial: What's in a Name? Distinguishing forced labour, trafficking and slavery

Nicola Piper, Marie Segrave and Rebecca Napier-Moore

Keywords: forced labour, human trafficking, anti-trafficking, labour rights

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Over the last fifteen years the parameters of anti-trafficking have shifted considerably. This shift has not been immediate or seismic. It has been a gradual shift, and what was once advocated for as a specific practice of trafficking is now associated with, and at times used interchangeably with, slavery and forced labour.

Why does this matter? It matters because the consequences are real. The slippage that occurs in the application and operationalisation of these labels for exploitation can have significant consequences for how we conceptualise, understand and respond to exploitation in legal and political (that is, advocacy) terms. It can transform the institutional response to victims and the extent to which we look to states or others (such as non-governmental organisations, trade unions, international organisations and corporations) to take responsibility and action. It matters because the outcome can be a broader international conversation that is confused and clouded by various stakeholders whose understanding of 'the problem' and how best to address it are informed by very different approaches. Is it possible, for example, for labour-focused advocacy, which may call for unionisation to protect workers, to sit alongside advocacy that problematises the label 'sex work' as a failure to recognise that this work is inherently gendered and exploitative? This is also a moment in which some stakeholders are leaving behind anti-trafficking's earlier core work of addressing sexual exploitation, and focusing instead on any sector *but* sex work.

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ANTI-TRAFFICKING REVIEW 5 (2015): 1-9

Evidence of the shift away from the emphasis on sex work is the International Labour Organization's (ILO) Protocol of 2014 to the Forced Labour Convention, 1930¹ (Forced Labour Protocol) which, in part, recognises debt bondage, human trafficking and other forms of modern slavery as all forms of forced labour. Arguably such an approach recognises the interconnection between exploitative practices—namely the overlap of issues around citizenship, migration status, poor working conditions and/or absence of workplace protections. This may enable a more united global effort to address the broad contributing factors that lead to the occurrence of such exploitation. However, there is also the potential for an expansive approach, which allows labels to be used interchangeably, to result in a lack of focus. This Special Issue of the *Anti-Trafficking Review* highlights the importance of attending to what we mean when we talk about human trafficking, forced labour and slavery.

The scenario of a lacking focus or indeed a purposeful blurring of the boundaries of these exploitative practices has immediate and potentially devastating consequences. At the individual level the socio-legal definitions can result in either non-recognition or sensational and victimising labeling, as a result of (a non-citizen, most often) experiencing exploitation. More broadly, as highlighted in the Debate contribution by Chuang, a further consequence of a blurred definitional distinction between human trafficking, slavery and labour exploitation is the absolving of actors from tackling systemic causes of exploitation, thus avoiding change sustained in the long term, which in turn affects the more immediate impact of measures to protect, intervene and punish. Questioning the increasing interchangeability of these terms matters more to some than others. Some may argue that we should simply throw every possible legal and human rights intervention at exploitation that broadly encompasses non-citizen forced (or otherwise) labourers and hope that something, anything, will have an impact. However we wish to take stock and consider whether such an approach is useful, impactful and, importantly, whether it is able to uphold human rights.

The purpose of this Special Issue is to identify and articulate what we see as unresolved conflicts between varying definitional approaches to a broad range of exploitative practices and to identify the arguments for where lines should or should not be drawn. It calls for researchers and practitioners alike

¹ In full: ILO, *C029—Forced Labour Convention, 1930 (No. 29), Convention concerning Forced or Compulsory Labour*, 28 June 1930.

to be mindful of the specific nature of the exploitation to which they are drawing attention and the manner of doing so.

The call for papers for this issue set a challenge to contributors: to assist the broader academic and practitioner community to not only interrogate these issues but to try to identify comprehensive and durable solutions to some of these concerns. We wanted contributors to consider whether it is possible to relate forced labour and trafficking to such significant issues as global supply chains, regulatory frameworks, the informal economy, inequality in the design and implementation of migration controls, and how they interact to produce exploitative conditions. We were interested in considering where and how human rights and state responsibility intersect and what the role of non-state actors (civil society, trade unions, corporations) is in obstructing or pushing this gap to close. The papers in this volume consider these issues in a range of geographical contexts—specifically including Brazil, Indonesia, Italy, the United Kingdom (UK), the United States of America (US) and the Southeast Asia region—as well as examining different concerns and responses. The discussions look at the role and impact of labour and migration law, corporate regulation, as well as trade union's policies and actions taken by civil society. Critically the articles contribute to four important thematic areas of discussion and analyses pertinent to the consideration of forced labour, human trafficking and slavery, as outlined below.

The first thematic area is the examination of **structural inequities and systemic abuse involved in labour exploitation**. The inescapability of these concerns when considering the issues at hand are indicative of the close proximity of exploitation and inequality. Within this issue, several authors examine formal and informal labour sectors and consider obstacles to organising and regulating labour (see papers by Ford, Marks and Olsen, Plant). These concerns are compounded by gender, ethnicity, and caste (as raised by Prasad). As a remedy, intergovernmental bodies and international actors have recently suggested global solutions. Given their current weakness or inadequacy, however, strong and sustained coalitions/networks/alliances are required between unions in different locations, as well as between unions and non-governmental organisations or grassroots organisations, as a push 'from below'.

The second thematic area across the articles is analysis of **progressive and/or regressive policy measures**. These measures may be at the hands of governments. For example, on a global level, as noted above, 2014 saw the adoption of the Forced Labour Protocol. As Ford notes in her article, the

ANTI-TRAFFICKING REVIEW 5 (2015): 1-9

Protocol recognises the high risk of forced labour faced by migrant workers (in all sectors), and emphasises the need for strengthened labour inspection. Papers in our volume note that in designing new legislation that passed in early 2015, the UK is following suit on the second point, though, unfortunately, not the first. Robinson shows how advocates managed to persuade politicians that there is indeed a connection between widespread labour abuses and severe labour exploitation, resulting in a renewed commitment, and importantly also funds, for labour inspection. Writing about one aspect of the same bill, Demetriou demonstrates that it also leaves much to be desired. There was a chance during the bill's drafting for domestic workers' visas to no longer be 'tied' to employers—a system known as *Kafala* in Middle East countries. *Kafala* systems in the UK and elsewhere restrict workers from changing employers or seeking redress when things go wrong. After debate, British policymakers decided to maintain the regressive visa system.

Looking comparatively at a different set of policy mechanisms that aim to address labour exploitation, Feasley examines Brazilian and American efforts to tackle forced labour in supply chains. Brazil's 'Dirty List' of companies with forced labour in their supply chains contrasts with the US federal-level outward-focus on 'conflict minerals' in supply chains and the state of California's sanction-less law requiring companies to disclose what they have done to address exploitation in their supply chains. Neither country's attempt to regulate corporations is straightforward, and corporate lobbying has complicated matters in both contexts, causing a *de facto* dismantling of the Dirty List in Brazil, and causing delays to implementation of laws in the US.

Progressive and/or regressive policy measures are also considered outside the governmental sphere. Specifically, trade unions' institutional policy must be considered when looking at issues of labour, migration and exploitation. Ford's paper highlights the risks and benefits for trade unions engaging in measures to counter forced labour and trafficking. Ford's contribution points to the need for unions in the global north to align with those in the global south and engage in 'union aid'. Marks and Olsen focus more specifically on two Southeast Asian nations, Thailand and Malaysia, and highlight the impact of union involvement in policy development and service provision. Critically, gender also needs consideration within the analysis of the potential for unionisation, given that women often work in sectors that are not unionised and/or are hard to unionise, such as domestic work. This poses challenges beyond simply expanding current unionisation practices into new, informal sectors.

The third thematic area emerging from this collection is that of **migration pathways**. Varying forms of migration intersect with forced labour and with trafficking. People travel with agents who may take them through legal or illegal routes. They move in search of livelihoods or security. Lewis and Waite demonstrate in their contribution to this issue that refugees and asylum seekers must also be considered when looking at forced labour and trafficking, and that these groups can be and are subjected to exploitation. Employing an intersectional approach they argue that refugee and asylum seeking situations can lead to people facing 'hyper precarity' in work contexts.

Palumbo and Sciarba consider legal routes within the European Union (EU) and the relationship of those with forced labour and trafficking. They argue that contrary to expectations that EU citizenship should result in protections from abuse, intra-EU migration, in this case from Romania to Italian farms in circular seasonal migration patterns, carries a high risk of exploitation. Job market options are limited, and women's economic needs and family obligations are high. Women end up settling for isolated work in farms, often accepting work on them because farms are one of the only work sites to which they can take their children. Not only do women farmworkers earn a scant EUR 15–20 (USD 17–22) per day with long workdays, but they are at high risk of sexual abuse from employers.

This issue of the *Anti-Trafficking Review* also considers forced labour (and its clear distinction from trafficking) involving those who do not move physically from place to place or across international borders. Prasad, for instance, reminds us of the persistence of bonded labour in India in which caste and entrenched feudal systems continue to tie workers to employers for years, if not generations.

The fourth thematic area speaks to a key impetus for the Special Issue and is the central focus of the Debate Section; **the examination of terminology**. Five authors address the following debate question: **Should we distinguish between forced labour, trafficking and slavery?** The debate contributions reflect much of the breadth of interpretations of this central question and the extent to which this question is understood to be either relevant and/or a priority for our contributors in the contexts within which they work. The debate brings to the fore diverse perspectives: from a range of geographical and sociopolitical contexts and from advocates to academics.

Chuang kicks off the debate with a legal and sociopolitical challenge to what she describes as a 'rebranding' of anti-trafficking as 'modern-day slavery'.

ANTI-TRAFFICKING REVIEW 5 (2015): 1-9

She argues the legally baseless term undermines prosecutions and trafficked persons' rights to remedy and assistance, as well as simplifying otherwise complex phenomena behind humanitarian discourse, leaving us free to ignore deep economic restructuring as a solution. David offers a clear counter argument. While recognising that internationally negotiated definitions are crucial to prosecutions, she notes that in the media and in public use, definitional distinctions have 'limited if any relevance'. David argues that media (when using wording like 'modern slavery') can raise attention to the level that public opinion then provides pressure for policy change, as well as effective attention to individual cases. Without using effective language, she says, we risk inaction. After tracing history of the terminology, Plant offers that debates should not centre around the definitions themselves, but around which problems need to be addressed through a law enforcement approach and which require careful and deep social and economic change. Paavilainen also reframes the proposed debate question. Instead of asking *whether* we should distinguish between the varying terms, she questions *when* it is necessary to distinguish between them. Like others, she argues that precise definitional distinctions must be made in national legislation and for law enforcement purposes. She argues however that promoting safe migration, improving labour protection, and awareness raising are areas where terminological precision is less important. Finally, in a world in which these terms tend to be sweeping and ignore context specificity, our debate ends with a fifth argument from Prasad that the term 'bonded labour' must not be forgotten. Bonded labour, in India, is a concept specific to intersectional caste and indigenous discriminations. Prasad importantly notes that the efforts to turn terminology away from bonded labour and towards any of the other terminological options (which in any case are usually not legally or definitionally fitting) only feeds into a 'culture of denial of bonded labour'. Overall the Debate Section reflects a range of positions that speak to both the specificity of meaning in key contexts, and the way in which at the macro and micro level the decisions made about socio-legal definitions matter in many different ways.

What emerges from this Special Issue, we hope, is a revealing insight into some critical contemporary considerations. Yet, it is a partial contribution to an area of examination that requires ongoing attention. There are some additional key themes that are pertinent, yet these were not addressed within the contributions included. In this sense the current issue is neither comprehensive nor final in its contribution. Some noticeably absent issues include, for instance, an analysis of prison labour and its intersection with

forced labour and trafficking. For example in Thailand where it was suggested that making prisoners work on boats would reduce demand for trafficked and forced labour on Thai fishing boats² or China where prison labour is used extensively. These practices connect contemporary and historical practices (such as the ‘convict labour’ that occurred in the white settlement of Australia) as well as enabling the examination of the evolution of the global capitalist system and modern forms of labour standards.

Another largely absent consideration pertains to the importance of attending to labour sectors and the specific dynamics in different contexts. This was alluded to by Ford but detailed discussion was only covered here in relation to domestic work (Demetriou), agriculture (Palumbo and Sciarba) and fishing (David). Other sectors such as sex work, construction or manufacturing are not considered specifically within the analysis offered in this volume and further specific and ongoing consideration is critical. One thing that is clear: all these sectors are labour intensive and/or isolated, often located within the informal economy and hence difficult to organise (but not impossible) because of geographical and social isolation, linguistic challenges and migrants’ temporary status or mobility. Therefore old models of unionisation are not adaptable, nor is there a one-size-fits-all approach to achieving collective action of any kind.

Finally a note regarding methodology. What requires ongoing consideration is a careful analysis of methodologies for defining or assessing the linkages and/or differences between forced labour, trafficking and slavery. This is somewhat telling: It is hard to do and never clear-cut. While we perhaps hoped that the call for papers might elicit a brave effort to suggest a way forward, what is revealed instead is a diversity of positions in relation to whether we do *need* to make distinctions and a range of views regarding *how* these definitional distinctions should be made. Where we may have hoped to identify a clear answer, we instead suggest that the conversation continue, with the issues and concerns raised in this collection, including the debate, kept in mind when forming future positions on the best way forward.

The contributions and discussions raise two critical points. First that it *does* matter to be clear about what we are referring to, whether we are adopting expansive or narrower definitions, or whether we are being purposefully broad. We need to understand why a definition is being used and to be clear

² Human Rights Watch (HRW), ‘Thailand: Don’t supply prisoners to fishing boats’, HRW, 10 December 2014.

ANTI-TRAFFICKING REVIEW 5 (2015): 1-9

about what it captures (and what it does not capture). To be able to bring research and advocacy together that is focused on different practices of exploitation or specific vulnerable groups requires clarity of meaning. Having shared understandings strengthens our ability to identify how best to respond and how to assess outcomes. Clarity also enables cause and effect to be identified and addressed. Several contributions to this Special Issue highlight that mainstream discussion on forced labour, trafficking, and/or slavery tends to be quite apolitical as a result of the blurring of concepts, resulting in few calls for any real lasting change to the way the economy works. Being clear about meaning and about why a particular approach is adopted and how it is being operationalised is essential. Our view on this is that a main ‘take-away message’ from this Special Issue is that the forced labour framework, rather than the trafficking one, gives us a lot of room to argue for systemic change. It entails the fight for unionisation and labour standards. The framework allows for the demand that workers be paid properly and employers are held accountable, and it even opens the door for us to look at deeper inequalities within and between countries that drive macro-economic pushes for a race to the bottom—a bottom that is highly exploitative. This in turn can only be addressed by a bottom-up approach via political activism from the grassroots level, based on workers’ experience and their understanding of what forced labour and a fair wage is.

The second and final point is that this discussion is *timely*. We must have these debates and conversations now—as we must identify the strengths and limitations of terminology as it is operationalised into everyday discourse, into law, into policy and advocacy. However, we hope this Special Issue highlights that the intention of engaging directly with definitional understandings is not to resolve what will be the ultimate universal language and meaning, rather to recognise and articulate both complexity and contradiction. There will never be one approach or understanding that is utilised internationally or locally. We must find a way to embrace the diversity of interpretations and understandings.

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Thematic Articles



Trade Unions, Forced Labour and Human Trafficking

Michele Ford

Abstract

This article examines the dilemmas facing trade unions seeking to engage on questions of forced labour and human trafficking. The International Labour Organization and elements of the international trade union movement have succeeded in getting forced labour on the policy agenda globally and within many national settings. However, trade unions have limited capacity to effect real change in relation to these issues because of limitations on their influence, determined largely by membership density and the limited number of sectors in which they are present, but also internal assessments of what constitutes ‘core business’. As a consequence, while trade unions may advocate for legislative or policy change, partner with non-governmental organisations to deal with particular cases, or even engage directly with vulnerable populations, the integration of those populations into the day to day concerns of trade unions necessarily remains elusive—particularly in the global south, where forced labour is most prevalent.

Keywords: international labour standards, international trade union movement, human trafficking

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Introduction

For trade unions, the existence of forced labour (and consequently of trafficking in persons for the purpose of economic exploitation) is of moral and, in some cases, material concern. As institutional representatives of workers, trade unions have a mandate to oppose all forms of exploitation associated with employment, and forced labour constitutes a clear violation of labour rights. Materially, trade unions have an interest in ensuring that their members' wages and working conditions are not undercut. In the words of the International Trade Union Confederation (ITUC): 'if labour rights are undermined in one part of the world, this can impact on labour standards of workers everywhere. Fighting forced labour is therefore fundamental to protecting and improving working conditions for all'.¹ At the same time, trade unions have limited resources, which they may feel are better used to further what they understand to be the direct interests of their membership.

These competing imperatives result in complex responses to calls from the International Labour Organization (ILO) for trade unions to champion, and participate in, the eradication of forced labour. These responses are driven by unions' values and contextual pressures, along with their organisational obligations and constraints. It is therefore necessary when analysing trade union responses to consider the degree to which the issue of forced labour resonates at different scales within the labour movement; the conceptual and material resources trade unions bring to the table when attempting to combat forced labour; and the benefits, risks and opportunity costs of engaging with the issue.

Since the international agenda has been very much driven by the ILO and its primary trade union partner, the ITUC, it is necessary to examine the ways in which these organisations have defined the terrain. This article thus begins by examining the concept of forced labour and the various ways in which its boundaries—internal and external—are defined, and how these definitions are refracted through the ILO's agenda. It then turns to the pragmatic question of what defines the capacity of trade unions to act against forced labour, and the strategies developed by trade

¹ ITUC, 'How to Combat Forced Labour and Trafficking: Best practices manual for trade unions', ITUC, 2009, p. 9.

unions to do so. Finally, the article reflects on the benefits and risks for trade unions of choosing to engage with the issue of forced labour, concluding that there remains serious doubt that trade unions can have a substantive impact, particularly in the global south where forced labour is most prevalent.²

Defining the Terrain

The ILO Forced Labour Convention³ defines forced labour as ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’.⁴ In 2005, this definition was refined, specifying three main categories of forced labour, namely (a) forced labour imposed by the state;⁵ (b) forced labour imposed by private agents for commercial sexual exploitation; and (c) forced labour imposed by private agents for economic exploitation. The latter category includes bonded labour, forced domestic work, forced labour of migrants in non-domestic occupations, and work associated with slavery.⁶ On the basis of this definition, the ILO estimates

² This article was produced as part of an Australian Research Council Future Fellowship project entitled ‘Trade Unionism and Trade Union Aid in Indonesia, Malaysia and Timor-Leste’ (FT120100778). It draws on an extensive review of documents produced by the ILO, the ITUC and the GUFs and in-depth, semi-structured interviews with staff in the head and regional offices of those organisations as well as with local trade unions in seven countries. Research was undertaken between 2005 and 2015 as part of two other Australian Research Council-funded projects, entitled ‘From Migrant to Worker: New transnational responses to temporary labour migration in East and Southeast Asia’ (DP0880081) and ‘Scaling Global Labour: Global Union Federations in India and Indonesia’ (DP130101650).

³ In full: ILO, *C029—Forced Labour Convention, 1930 (No. 29), Convention concerning Forced or Compulsory Labour*, 28 June 1930.

⁴ ILO, ‘Stopping Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work’, International Labour Office, 2001, pp. 9–10.

⁵ For a discussion of the ILO’s attempts to deal with state-sponsored forced labour in Myanmar, see K Maclean, ‘Lawfare and Impunity in Burma since the 2000 Ban on Forced Labour’, *Asian Studies Review*, vol. 36, no. 2, 2012, pp. 189–206.

⁶ ILO, ‘A Global Alliance Against Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work’, International Labour Office, 2005, p. 10. The ILO has made other attempts to better explain the nature of forced labour and its relationship with trafficking in persons. For example, to address the intersections between forced labour and trafficking, the ILO developed a ‘forced labour continuum’ in which it identified three categories of labour—trafficked victims of forced labour, non-trafficked victims of forced labour and successful migrants, see B Andrees and M N J van der Linden, ‘Designing Trafficking Research from a Labour Market Perspective: The ILO Experience’, *International Migration*, vol. 43, no. 1–2, 2005, pp. 55–73.

that some 20.9 million people experience forced labour globally, over half of whom can be found in the Asia-Pacific region.⁷ The ILO estimates that 18.7 million (90%) of those experiencing exploitation are located in the private economy.⁸

The way that forced labour is defined is not merely a matter of semantics. It shapes both the assessments of the problem and the responses to it. Just as the current preoccupation with human trafficking has led to a tendency to conflate it with low-skilled labour migration,⁹ many activists—and some scholars—define forced labour so broadly that it encompasses practices like compulsory overtime or the payment of low wages. While such practices are clearly exploitative, they do not constitute forced labour under the ILO definition, since the workers affected may choose to leave their place of employment.¹⁰ Equally significant is the distinction made by the ILO itself between forced sexual labour and forced labour for ‘economic exploitation’, a distinction that has roots in long-standing debates about whether sex work should be considered work.¹¹ Another possible distinction, but one not drawn by the ILO in its 2005 typology, is that between forced labour in formal sector occupations (such as in the case of some irregular labour migrants working in factories on the Thai-Myanmar border) and the potential for forced labour in informal sector occupations, most notably in live-in domestic work. While not significant in any moral or necessarily even any experiential sense, this distinction is nonetheless extremely relevant when considering trade unions’ responses to forced labour because of their traditionally stronger focus on organising workers in formal sector occupations.

⁷ ILO, ‘A Global Alliance Against Forced Labour: Global report’, pp. 1–2.

⁸ ILO, ‘A Global Alliance Against Forced Labour and Trafficking in Persons: Key achievements of the ILO’s Special Action Programme to Combat Forced Labour and Trafficking in Persons, 2001–2011’, International Labour Office, 2012, p. 1.

⁹ For discussion on this, see M Ford et al., ‘Labour Migration and Human Trafficking’ in M Ford, L Lyons and W van Schendel (eds.), *Labour Migration and Human Trafficking in Southeast Asia: Critical perspectives*, Routledge, Abingdon, 2012, pp. 1–22.

¹⁰ See J Lerche, ‘A Global Alliance Against Forced Labour: Unfree labour, neo-liberal globalization and the International Labour Organization’, *Journal of Agrarian Change*, vol. 7, no. 4, 2007, pp. 425–452 for an argument for the recognition of a continuum of forced labour that moves beyond the binary of forced/unforced to recognise the role of economic compulsion—as opposed to the non-economic forms of compulsion built into the ILO definition—in forcing workers to enter forced labour arrangements in India.

¹¹ M Ford, L Lyons and W van Schendel.

Engaging with the Issue

Internationally, the ILO has been the primary driver of the campaign against forced labour, with a history that stretches back to the organisation's formation in 1919.¹² In a renewed surge of interest almost a century later, the ILO released what it described as its first global report on forced labour in 2001. The report called for a concerted programme of international action to address contemporary manifestations of the problem.¹³ In the same year, the ILO designated the elimination of forced labour as one of nineteen outcomes to be achieved in its 2010–2015 Strategic Policy Framework. To achieve this, it set up a Special Action Programme to Combat Forced Labour (SAP-FL). A second report, issued in 2005, proposed a four-year action plan¹⁴ that focused on the need for increased labour market regulation; better legislation and law enforcement; focused programmes involving government, employers and unions, and 'other national and international partners'; as well as efforts to ensure that such programmes attract media coverage. Key to this strategy were plans to establish a Global Alliance Against Forced Labour, comprised of employers, unions, academics and Civil Society Organisations, as well as different parts of the UN system and other international bodies and networks. The ILO subsequently adopted a new protocol to the Forced Labour Convention in June 2014, which included new measures, among them ensuring the coverage and enforcement of legislation relevant to the prevention of forced labour applies to all workers and all sectors of the economy, and strengthening labour inspection services. It also emphasised the presence of modern forms of forced labour in the private economy, which had been previously subordinated to discussions of state-sanctioned compulsory labour. Lastly, it made recommendations in regard to the particular vulnerability of migrant workers.¹⁵

The ILO had engaged with business in a limited way on the issue of forced labour through the United Nations (UN) system's business partnership agreement, known as the Global Compact, which offers

¹² For a history of the ILO's engagement with the issue, see D R Maul, 'The International Labour Organization and the Struggle Against Forced Labour from 1919 to the Present', *Labor History*, vol. 48, no. 4, 2007, pp. 477–500.

¹³ ILO, 'Stopping Forced Labour', pp. 1–124.

¹⁴ ILO, 'A Global Alliance Against Forced Labour: Global report', p. 82.

¹⁵ ILO, *Protocol of 2014 to the Forced Labour Convention*, 1930 (No. 29), 28 May–12 June 2014.

information on how to run a commercial or agricultural business in a way that avoids the emergence of debt bondage.¹⁶ But, as part of its 2005 initiative, the ILO sought to engage more broadly, primarily through the International Organisation of Employers (IOE) and its network of national business federations. In 2008, the ILO released a ‘Handbook for Employers and Business’ and a document entitled ‘Ten Principles for Business Leaders to Combat Forced Labour and Trafficking’, the content of which was reflected in the IOE’s first position paper on forced labour, released in 2010.¹⁷ This, along with workshops for employers, resulted in national business federations in several countries adopting codes of conduct with guidelines to prevent and eliminate forced labour practices.¹⁸ This expanded work with employers built on attempts to engage with trade unions around the issue of forced labour. In training material developed for the Global Alliance Against Forced Labour, the ILO identified a number of possible union strategies including public policy, industrial, political and solidarity initiatives.¹⁹

The ITUC formally came on board in 2007, when it co-founded the Global Trade Union Alliance to Combat Forced Labour and Human Trafficking with the ILO’s Bureau of Workers Activities (ACTRAV) and SAP-FL.²⁰ The ITUC’s decision to act in a more concerted way on the issue was very much driven by the ILO’s 2005 announcement of its four-year action plan.²¹ Its first step was to conduct a survey, which revealed that some trade unions were involved in work on forced labour. However, it also ‘confirmed that much remained to be done to ensure that the full extent and nature of forced labour and trafficking, and the wide variety of forms in which they occur, are fully understood and combated by the global trade union movement’.²² This survey preceded

¹⁶ ILO, ‘Stopping Forced Labour’, pp. 86.

¹⁷ IOE, ‘IOE Guide on Forced Labour: Why it is an issue for employers’, IOE, 2010.

¹⁸ ILO, ‘A Global Alliance Against Forced Labour and Trafficking in Persons’, p. 6.

¹⁹ International Training Centre of the ILO, ‘Training Materials for a Global Alliance Against Forced Labour’, International Training Centre of the ILO, Turin, 2006.

²⁰ ITUC, ‘How to Combat Forced Labour and Trafficking’, p. 9. Note that the ITUC no longer coordinates the Global Trade Union Alliance, although it still maintains a project on forced labour and trafficking. The last Global Trade Union Alliance newsletter, ‘Emancipate’, was published in 2010.

²¹ ITUC, ‘Circular No. 24 (2007) Forced Labour and Trafficking Survey’, ITUC, 2007, p. 1, retrieved 9 April 2015, http://www.ituc-csi.org/IMG/pdf/No_24_forced_Labour_and_Trafficking_Survey.pdf

²² ITUC, ‘Circular No. 3 (2008) Towards a Global Trade Union Alliance Against Forced Labour and Trafficking’, ITUC, 2008, p. 1, retrieved 9 April 2015, http://www.ituc-csi.org/IMG/pdf/No_03_-_Forced_Labour_and_Trafficking.pdf

meetings in Kuala Lumpur, Malaysia, and Turin, Italy, in late 2007, which brought together affiliates and regional organisations, the Global Union Federations (GUFs) and the ILO Bureau for Workers' Activities. The action points endorsed included efforts to:

- promote relevant ILO Conventions;
- raise awareness of the issue among trade union members and officials and the wider public;
- address forced labour and trafficking issues in bipartite and tripartite negotiations and agreements;
- encourage trade unions to devote resources to the development of policies against forced labour;
- monitor employment agencies and companies and their supply chains to detect and combat forced labour and trafficking practices;
- identify, document and expose cases of forced labour;
- establish bilateral, sectoral or regional trade union cooperation agreements, and appropriate alliances or coalitions with civil society organisations;
- cooperate with labour inspection services, law enforcement and other relevant national, regional or international authorities or interagency working groups;
- engage in outreach and direct support to informal, unprotected and migrant workers at risk, to address their specific situation and needs, including through their integration in trade union ranks;
- ensure that proper attention is paid to all aspects of racism and discrimination, including in particular its gender dimension, as women and girls are especially at risk; and
- work closely with GUFs to target sectors where forced labour and trafficking are most likely to occur.²³

These strategies can be more or less easily assigned to one or more of the four categories identified by the ILO in 2006. Examples of public policy initiatives include strategies like promoting ILO conventions, awareness raising with officials and the wider public, and encouraging reform. Monitoring employment agencies and supply chain practices, and cooperating with labour inspection services, law enforcement and other relevant authorities are examples of what the ILO calls political

²³ ITUC, 'Towards a Global Trade Union Alliance Against Forced Labour and Trafficking'.

initiatives. Alliance and coalition formation, as well as collaboration with the GUFs to establish internationally recognised union membership are solidarity initiatives, as is outreach work, for example to migrant workers. Instances where outreach work involves unionisation, or where forced labour and trafficking issues are addressed in bipartite and tripartite negotiations, meanwhile, are examples of industrial initiatives.

While the ILO and the ITUC took the lead on policy, a key group of players in the solidarity, political and industrial spaces have been the GUFs, which represent unions in particular sectors at the international level. The GUFs are well-placed to engage not only because of the global scale of forced labour practices and trafficking for economic purposes, but also because of its often transnational character as a consequence of supply chains and the increasing prevalence of international labour migration. ‘From Catcher to Counter’, a joint campaign by the International Transport Federation (ITF) and the International Union of Food Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Associations (IUF), demonstrates the multiscalar potential for action. The campaign, which is primarily focused on illegal fishing and lack of regulation in the sector, now works on issues of trafficking and forced labour. For example, it created a media exposé of slave labour in the Thai prawning industry, which criticised the Thai government for voting against the new ILO protocol to fight forced labour. The campaign also backed the Norwegian retailer, Ica, in its decision to remove scampi products linked to companies involved in human trafficking.²⁴

‘From Catcher to Counter’ is an example of what the ILO has described as a political initiative. Other examples involving the ITF include its 2006 World Cup campaign to raise awareness among spectators about trafficking²⁵ and collaboration between ITF and Interpol after ITF inspectors in Cape Town found seventy-four Indonesian fishers kept on

²⁴ ITF, ITF-IUF Press Release: Unions welcome Thai fisher slavery exposé, 2014, retrieved 21 July 2015, <http://www.itfglobal.org/en/news-events/press-releases/2014/june/itf-iuf-press-release-unions-welcome-thai-fisher-slavery-exposé/>

²⁵ J Beirnaert, ‘A Trade Union Perspective on Combating Trafficking and Forced Labour in Europe’ in C Rijken (ed.), *Combating Trafficking in Human Beings for Labour Exploitation*, Wolf Legal Publishers, Nijmegen, 2011, p. 471.

Taiwanese vessels abandoned in South Africa with no wages.²⁶ Another campaign that falls into the category of political initiative, but is also a solidarity initiative, is the 2001 Cocoa Protocol, which was formulated by the cocoa industry, trade unions and human rights organisations. The Protocol set out a framework to address forced labour including research into labour conditions, a verification system to ensure production of the cocoa products is free from forced labour, and the establishment of the International Cocoa Initiative (ICI), the Board of which initially included representatives of the ITUC and the IUF.²⁷ IUF is, however, no longer party to the initiative, and Education International, which subsequently became involved, has focused on providing vocational training for unqualified teachers working in the cocoa plantation zones, not on forced labour.²⁸

In the industrial sphere, meanwhile, one of the chief mechanisms for engagement with the issue of forced labour has been through Global Framework Agreements (GFAs, previously referred to as International Framework Agreements). Even before the ILO's 2005 initiative, the majority of GFAs addressed the issue of forced labour. As of December 2002, forced labour was mentioned in seventeen of the twenty GFAs that had been signed at that time.²⁹ The focus on forced labour was maintained in more recent agreements, with fifty-three of the fifty-nine GFAs signed as of May 2008 including a prohibition on forced labour.³⁰ In one example, a GFA signed between the International Textile, Garment and Leather Workers' Federation (ITGLWF) and Inditex, a global retailer based in Spain, prevented suppliers from sub-contracting without prior written consent from Inditex. The agreement prohibited forced labour, requiring that suppliers must not extract any kind of 'deposit' from workers nor retain their identity papers. Monitoring was to be conducted jointly

²⁶ ITF, 'ITF Reports Crewing Agents to Interpol for Suspected Human Trafficking', ITF, 2014, retrieved 13 April 2015, <http://www.itfglobal.org/en/news-events/news/2014/may/itf-reports-crewing-agents-to-interpol-for-suspected-human-trafficking/>

²⁷ ITUC, 'How to Combat Forced Labour and Trafficking', p. 33.

²⁸ Education International, 'We Help Deprived Communities Help Themselves', Education International, 2012, retrieved 9 April 2015, http://download.ei-ie.org/SiteDirectory/ChildLabourEditorialGroup/Doc/Interview_ghana_eng.pdf

²⁹ ILO, 'Global Labour Agreements: A framework for rights', *The World of Work: The Magazine of the ILO*, no. 45, 2002, p. 7.

³⁰ P Wilke and K Schütze, 'Background Paper on International Framework Agreements for a Meeting of the Restructuring Forum Devoted to Transnational Agreements at Company Level', Hamburg, 2008, p. 7.

by Inditex and the GUF.³¹ It is difficult to see how these kinds of references to forced labour are anything more than formulaic given that forced labour and human trafficking for economic exploitation are relatively unlikely to occur in the formal economy, of which Inditex's suppliers are part.

In another example, UNI Global Union signed a Memorandum of Understanding with the International Confederation of Private Employment Agencies (CIETT), which covers temporary agency work industry globally in 2008. The agreement included a commitment to decent working and employment conditions, and an undertaking to promote the ratification of ILO Convention No. 181³² and to collaborate with key stakeholders to work towards eliminating human trafficking.³³ According to CIETT's Managing Director, the agreement would 'help to promote quality standards within the industry, prevent unfair competition by fraudulent agencies and/or user companies and fight human trafficking'.³⁴ Agency work is highly unregulated, particularly where it pertains to informal sector occupations such as construction, agricultural and domestic work. As a consequence, workers are vulnerable to exploitation.³⁵ The real question, though, is the extent to which such an agreement reaches the workers in those sectors who are most likely to be subjected to forced labour.

A second type of GUF-driven industrial strategy, which illustrates the limitations faced by unions due to the interests of union members and the structure of the economy, involves organising drives in a particular multinational. As an example, Nestlé's own corporate business principles, created unilaterally, draw on the UN Global Compact's four guiding principles on labour, the fourth of which concerns the elimination of all

³¹ J Beirnaert, p. 491; ITUC, 'How to Combat Forced Labour and Trafficking', p. 33.

³² In full: ILO, *C181—Private Employment Agencies Convention, 1997 (No. 181) Convention concerning Private Employment Agencies*, 19 June 1997.

³³ ITUC, 'How to Combat Forced Labour and Trafficking', p. 32.

³⁴ D Pennel cited in UNI Global Union and CIETT, 'UNI Global Union and CIETT Corporate Members Launch Global Dialogue on Temporary Agency Work', UNI Global Union and CIETT, 2008, retrieved 10 April 2015, http://www.ciett.org/fileadmin/templates/ciett/docs/Press_release_UNI_CiETT_CMC_on_MoU_12-11-08.pdf

³⁵ ILO, 'Background Note: Regulating private employment agencies', Regional Tripartite Conference on ILO Convention No. 189: Raising awareness and sharing knowledge on decent work for domestic workers Cairo-Egypt, ILO, 2012, retrieved 10 April 2015, http://www.ilo.org/wcmsp5/groups/public/—arabstates/—ro-beirut/documents/genericdocument/wcms_210535.pdf

forms of forced and compulsory labour.³⁶ Although the IUF has had success in increasing union density, the campaign focuses on the concerns of local affiliates with subcontracting and casualisation.³⁷ Despite the fact that forced labour has been a major concern for non-governmental organisation (NGO)-led campaigns against Nestlé, the IUF has had little to say on the issue because the practice is found predominantly among cocoa harvesters rather than in factories where cocoa is processed.

Regional trade union federations have also recognised the often multiscalar nature of forced labour in the contemporary world, most evidently through processes of migration. The European Trade Union Confederation (ETUC), for example, has targeted European Union (EU) migration policy in relation to forced labour and trafficking in persons, most actively through political and policy initiatives. For example, in 2007 it released a joint statement with the Platform for International Cooperation on Undocumented Migrants (PICUM) and SOLIDAR (formerly International Workers Aid) in response to a proposal of the EU for sanctions for employers who employ ‘illegally present third-country nationals’. The statement pointed out the ineffectiveness of the proposed sanctions when a framework of rights for migrant workers had not been established and urged the EU to adopt a stronger framework with all relevant international instruments issued by the UN, ILO and the Council of Europe to ensure the rights of undocumented workers.³⁸ The ETUC again criticised the EU in 2009 when sanctions against employers of irregular migrants were introduced, arguing that the sanctions encouraged longer chains of sub-contracting, and that the move was ‘yet another signal that the EU prioritises repressive migration policy over clear policies against labour exploitation’.³⁹

³⁶ S Rüb, ‘Development of the Global Trade Union Network within the Nestlé Corporation: Can trade unions square up to the power of transnational companies?’, Friedrich-Ebert-Stiftung, Bonn, 2004, pp. 33–34.

³⁷ P Garver, K Buketov, H Chong and B S Martinez, ‘Global Labor Organizing in Theory and Practice’, *Labor Studies Journal*, vol. 32, no. 3, 2007, pp. 237–256.

³⁸ ETUC, PICUM and SOLIDAR, ‘Joint Comments of ETUC, PICUM and SOLIDAR on Expected Commission Proposals to Fight “Illegal” Employment and Exploitative Working Conditions’, 2007, retrieved 21 July 2015, http://picum.org/picum.org/uploads/file_/joint_comments_ETUC_PICUM_SOLIDAR_2604507_EN_final.pdf

³⁹ ETUC, ‘Sanctions Against Employers of Irregular Migrants: ETUC deplores a toothless and counterproductive instrument’, 2009, retrieved 13 April 2015, <http://www.etuc.org/press/sanctions-against-employers-irregular-migrants-etuc-deplores-toothless-and-counterproductive#.VMhO72iUenc>

Although regional trade union federations are less prominent in other regions, similar initiatives have been undertaken by the ASEAN Trade Union Council (ATUC), which represents eighteen national trade union federations in nine of the ten ASEAN states. ATUC lobbies governments in the region to respect the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, adopted at the Twelfth ASEAN Summit in Cebu, Philippines, in 2007. It has also been active in lobbying for better jobs for migrant workers in the context of the development of the ASEAN Economic Community. At the Seventh ASEAN Forum of Migrant Labour in Myanmar in 2014, ATUC affiliates identified standard employment contracts; pre-employment, pre-departure, post-arrival and reintegration programmes; migrant workers' membership in unions; the establishment and strengthening of Migrant Resource Centres; and capacity building for migrant labour focal points in affiliates, and implementation of the ATUC interunion agreement as priorities.⁴⁰

A third scale at which these initiatives have been important is the national scale. Trade unions in some European countries have pushed for legislation change so that all construction workers, including migrant workers, are to be covered by labour regulations, thus reducing the possibility of forced labour practices.⁴¹ In Spain, since 2010 the General Workers Union (Unión General de Trabajadores, UGT) has run a campaign entitled 'For Decent Work, Against Labour Exploitation', which has combined political and industrial initiatives. As part of this campaign, the UGT sought to establish a partnership with the General Council of the Judiciary, the State's Public Prosecutor's Office, the Ministry of Labour and Immigration and the Home Office. This would be accompanied by a protocol of action that trade unions and industry could sign on to, and that would facilitate the signing of collective agreements on the issue of forced labour. The UGT also supported the reform of laws relating to the crime of human trafficking and the rights and freedoms of foreigners.⁴²

⁴⁰ ATUC, 'Accelerating Actions to Implement the ATUC Inter-Union Cooperation Agreement Among ASEAN Unions As Strategy To Promote Decent Work and to Implement Recommendations of the 7th ASEAN Forum On Migrant Labor (AFML)', 2014, retrieved 13 April 2015, <http://aseantuc.org/wp-content/uploads/2011/07/ATUC-Statement-ACCELERATING-ACTIONS-TO-IMPLEMENT-inter-union-agreement-and-7th-AFML-recommendation-rev-5.pdf>

⁴¹ ILO, 'A Global Alliance Against Forced Labour and Trafficking in Persons', p. 53.

⁴² UGT, 'For Decent Work Against Labour Exploitation', 2010, retrieved 13 April 2015, http://www.ituc-csi.org/IMG/pdf/UGT_Anti-Trafficking_Campaign_EN.pdf

In another example, in the United Kingdom (UK), the Trades Union Congress (TUC) and UNITE persuaded the government to introduce renewable one-year visas for domestic workers, which gave them the right to change employers without losing their visa status.⁴³

In another example from the UK, the British Transport and General Workers Union (BTGWU) campaigned in conjunction with other organisations for greater regulation of the gangmasters who recruit temporary workers for agricultural work, many of which are known to have ties to smuggling and trafficking rings.⁴⁴ The government subsequently passed the Gangmasters (Licensing) Act 2004, which resulted in the establishment of a register to enable greater monitoring, and the requirement that gangmasters renew their licences every two years. A later review of the efficacy of the Act found that it had been to some measure effective in tackling exploitation, though nevertheless limited by its narrow sectoral focus and a low prosecution rate.⁴⁵

A different type of approach at the national and sub-national scale involves a firmer focus on industrial initiatives. The ITUC recognised that the issue of forced labour intersected with work already being carried out by trade unions, particularly with regard to engagement with non-traditional constituencies, including informal sector workers and migrant workers.⁴⁶ It is important, however, to distinguish between forms of outreach work—such as partnering with NGOs to deal with particular cases or to advocate for legislative change, working directly with vulnerable populations to provide information about their labour rights, or even helping them to set up a cooperative or association—and the integration of non-traditional constituencies vulnerable to forced labour into the ‘core’ union business of collective engagement within the industrial relations system. It is the latter that constitutes an industrial initiative as described by the ILO.

⁴³ ITUC, ‘How to Combat Forced Labour and Trafficking’, pp. 17–19.

⁴⁴ V Schmidt, ‘Temporary Migrant Workers: Organizing and protection strategies by trade unions’ in C Kuptsch (ed.), *Merchants of Labour*, ILO, Geneva, 2006, pp. 192–193.

⁴⁵ M Wilkinson, G Craig, A Gaus, ‘Forced Labour in the UK and the Gangmasters Licensing Authority’, The Wilberforce Institute for the Study of Slavery and Emancipation, University of Hull, 2010, pp. 14, 39.

⁴⁶ ITUC, ‘ITUC Strategy to Build a Workers’ Alliance to Combat Forced Labour and Trafficking’, ITUC, 2007, retrieved 13 April 2015, http://www.ituc-csi.org/IMG/pdf/D2S4_ITUC_Action_Plan_to_Combat_Forced_Labour_and_Trafficking.pdf

There are two primary models of unionisation of groups that are vulnerable to forced labour. The first is to recruit them into existing trade unions and to protect their interests through standard collective bargaining processes and other mechanisms available to members of those trade unions. Such a model is possible primarily in unionised sectors with a predominance of formal sector labour, or in particular semi-formal sector occupations like construction where trade unions are most likely to be found. Examples of this include the Union of Employers of Port Ancillary Services (IEPAS), a Malaysian trade union that has proactively recruited temporary migrant workers in recognition of the fact that the union would no longer be viable if migrant workers, which made up the vast majority of blue-collar port workers, were ignored.⁴⁷

The second model involves encouraging the unionisation of vulnerable populations through a strategy that bears some similarities with the model of ‘separate organising’ adopted by women workers in some contexts,⁴⁸ or supporting such unions where they have emerged independently. One such example of this occurred in Greece in 2008, where 1,500 self-organised foreign agricultural workers, some of whom were working in a situation of forced labour, took strike action, which from the second day of the strike was supported by established unions.⁴⁹ In another example, the Hong Kong Confederation of Trade Unions (HKCTU) accepted into its ranks unions of self-organised foreign domestic workers and migrant construction workers. Industrial initiatives at these national and sub-national scales intersect with international industrial initiatives through the work of GUFs, such as the Building and Wood Workers’ International (BWI) and UNI Global Union, and the IUF, which have actively promoted cross-border union membership in efforts to bring migrant workers, including those at risk of forced labour, into destination country unions.⁵⁰

⁴⁷ M Ford, ‘The Global Union Federations and Temporary Labour Migration in Malaysia’, *Journal of Industrial Relations*, vol. 55, no. 2, 2013, pp. 260–276.

⁴⁸ K Broadbent and M Ford, ‘Women and Labour Organizing in Asia’ in K Broadbent and M Ford (eds.), *Women and Labour Organizing in Asia: Diversity, autonomy and activism*, Routledge, London and New York, 2008.

⁴⁹ M Papantoniou-Frangouli, ‘Trafficking for Labour in Greece’, Churches Commission for Migrants in Europe, Athens, 2011, pp. 32–33.

⁵⁰ J Beirnaert, p. 485.

Potential to Achieve Change

The labour movement's capacity to achieve change in relation to the issue of forced labour is seriously limited by trade union density, coverage and interests, as Carstensen and McGrath have observed citing the 2005 Brazilian National Pact to Eradicate Slave Labour.⁵¹ In 2003, Brazil's federal government, supported by the ILO, established a National Commission to Eradicate Slave Labour and National Plans for the Eradication of Forced Labour. As part of this initiative, the Ministry of Labour and Employment began publishing a 'Dirty List' of firms and individuals found to be using slave labour. Enterprises and organisations can sign up to the pact, committing to not collaborate with companies and individuals appearing on that list. According to Carstensen and McGrath, the efficacy of this approach was limited, since buyers can find suppliers not yet subject to labour inspections and some companies have obtained injunctions to prevent their names from being on the list. In the process, the risk of slave labour becomes isolated from the wider landscape of labour rights and does not necessarily strengthen the bargaining power of workers or unions.

Carstensen and McGrath go on to argue that strategies such as these are in fact most relevant where trade unions are weak or non-existent. This reflects the fact that trade union strength, but also density, are limiting factors particularly when it comes to trade unions' capacity to implement industrial initiatives against forced labour. Trade union density has implications for the effectiveness of IFAs since, without intensive monitoring by local trade unions, companies have little incentive to comply.⁵² It also limits the reach and effectiveness of locally driven initiatives. To complicate matters further, forced labour is often concentrated in sectors that are difficult to organise and might not be of strategic importance to unions, such as domestic work, sex work or agriculture. It is difficult and resource-intensive to organise or even engage with these sectors⁵³ because the workers are often employed in small-scale workplaces or, in the case of domestic workers, in the homes of

⁵¹ L Carstensen and S McGrath, 'The National Pact to Eradicate Slave Labour in Brazil: A useful tool for unions?', *Global Labour Column*, vol. 117, 2012.

⁵² For discussions of the strengths and weaknesses of IFAs see, for example M Fichter, M Helfen and J Sydow, 'Regulating Labor Relations in Global Production Networks: Insights on International Framework Agreements', *Internationale Politik und Gesellschaft*, issue 2, 2011.

⁵³ ITUC, 'Mauritania-Senegal: Defending the rights of migrants', *Union View*, no. 16, 2009; A Tate, 'Trafficking: A trade union and global perspective', *Frontline*, vol. 15, 2007.

employers, and are therefore difficult to recruit. Even where forced labour does occur in a relatively highly unionised sector, trade unions have traditionally been reluctant to devote resources to it, except where it has a direct effect on their members' interests, as in the case of migrant workers. In both cases, workers in such vulnerable situations may also be reluctant to be recruited, especially in situations where foreign workers are involved. This could be for various reasons including fear of detection in the case of foreign workers without a work permit, or loss of labour rights in the case of foreign workers on a limited-purpose visa.

While less directly dependent on trade union presence within a particular workplace or industry, political and solidarity initiatives also bring their own challenges. As evidenced in the examples presented earlier, trade unions can successfully lobby for legislative or policy change on forced labour. They can also work with law enforcement agencies or NGOs to identify cases of forced labour. However, their capacity to succeed in any national setting depends on a constellation of variables including the strength of the union movement, its relationship with government, and the openness of government to engage. Solidarity initiatives, meanwhile, depend on trade unions having sufficient resources—financial and other—to engage with NGOs or other parties. Remediating individual cases of forced labour is particularly resource-intensive, and often controversial, especially in contexts where trade unions have difficulty servicing the needs of their core membership. As noted in a study conducted for the TUC in the UK, barriers to union engagement at the grassroots level include the reluctance of those subjected to forced labour or trafficking to approach a union; the absence of enforcement powers to allow unions to take action; and a lack of funding for unions to deal with the issue.⁵⁴ In many cases, trade unions may experience pushback from members resentful of the expenditure of union funds on such initiatives.⁵⁵

The efficacy of policy work conducted directly by regional trade unions or through the ILO is subject to similar caveats. High-level policy engagement can be in many cases productive, particularly in terms of

⁵⁴ B Anderson and B Rogaly, 'Forced Labour and Migration to the UK', Centre on Migration, Policy and Society (Oxford University) and Trade Union Congress, 2005.

⁵⁵ The Executive Director of the HKCTU, Elizabeth Tang, describes instances in the mid-1990s when its offices were fireballed and covered with graffiti by members unhappy with the use of union resources to help foreigners, see S Grumiau, 'Spotlight Interview with Elizabeth Tang (HKCTU-Hong Kong)', ITUC, 2010, retrieved 13 April 2015, <http://www.ituc-csi.org/spotlight-interview-with-elizabeth>

entrenching issues like forced labour in the discourse of labour rights. In the right circumstances, international pressure can encourage governments to initiate change, as evidenced by the fact that some governments have agreed to work with the ILO on efforts to reduce forced labour and trafficking. However, many governments have little or no interest in engaging on this issue. While states that are signatories to the Forced Labour Convention are obliged to protect people against forced labour, governments often unwilling to acknowledge occurrence of forced labour in their jurisdiction,⁵⁶ in some cases because of links to industries that rely on forced labour,⁵⁷ in others because detection could lead to the state being held responsible for human rights abuses.⁵⁸ In such cases, trade unions and their international allies may well continue to push for change. Their capacity to achieve it, however, is another matter.

Conclusion: Benefits and risks

Insofar as trade unions do have capacity to contribute to efforts to eradicate forced labour, it is incumbent on their leadership to assess the risks and benefits of doing so. But even in situations where there is little or no external threat associated with campaigning on forced labour, trade unions that choose to engage with the issue may have difficulty convincing the union membership that campaigns they see as being peripheral to their core interests should be allowed to eat up scarce resources.⁵⁹ There is also the risk of exacerbating the situation. In contexts where foreign workers are of greatest risk of being subjected to forced labour, trade unions may—consciously or inadvertently—argue for stricter regulation of migration, which may in turn expose irregular migrants to a higher risk of labour exploitation by forcing migrants to work in situations where they have even less chance of protection under the law.⁶⁰

⁵⁶ A Tate.

⁵⁷ B Rogaly, 'Migrant Workers in the ILO's Global Alliance Against Forced Labour Report: A critical appraisal', *Third World Quarterly*, vol. 29, no. 7, 2008.

⁵⁸ R Plant and C O'Reilly, 'Perspectives: The ILO's Special Action Programme to Combat Forced Labour', *International Labour Review*, vol. 142, no. 1, 2003.

⁵⁹ In situations where governments themselves are engaged in forced labour, or have close links to those who are, attempts to oppose it could not only deplete trade unions' capacity to influence policy on other issues, but may even endanger their very existence.

⁶⁰ M Ford, L Lyons and W van Schendel, p. 1.

Recognising these risks, the ITUC encouraged unions to act strategically in ways that complement and reinforce already existing priority areas, noting that: ‘campaigns to unionise more workers, enforce labour legislation, increase employment opportunities or combat discrimination in the work place [sic] can all be effective tools in the elimination of forced labour’.⁶¹ In contexts where trade unions are strong, forced labour is less prevalent as a consequence of these kinds of synergies. Conscious inclusion of efforts to reduce forced labour as an element of industrial initiatives could bring further benefit in such contexts by stretching unions’ repertoires of action in ways that position them to better deal with an increasingly flexible labour market. However, for the reasons discussed above, this strategy is likely to have little impact on the occurrence of forced labour in the contexts in which it is most prevalent as a consequence of the limits that trade union strength and density place on their capacity to act.

In sum, the forms of engagement that labour movement organisations choose, their capacity to engage effectively—not to mention their willingness to engage at all—depends greatly on their exposure to the issue of forced labour and their position within the complex web that is the international labour movement. For local trade unions, however, it also depends upon their relative capacity to deal with issues seen to be largely external to their core concerns. At the broad level of policy, the international labour movement, in concert with the ILO, has shown itself to be prepared to embrace forced labour as an issue. At the national and grassroots level, there have been some efforts to reach out to workers at risk of trafficking or forced labour, but these are limited almost completely to the global north.

In the global south, where trade unionism is generally more fragile, initiatives have been largely undertaken at the behest of international institutions, and in many cases involvement is limited to participation in workshops or projects run in conjunction with the ITUC or ILO. Examples of such cases include initiatives through the ILO’s Greater Mekong Sub-regional Project to Combat Trafficking in Children and Women, such as a workshop co-hosted by the Vietnam General Confederation of Labour (VGCL) to train its members on issues of human trafficking.⁶² More extensive programmes have been

⁶¹ ITUC, ‘How to Combat Forced Labour and Trafficking’, p. 9.

⁶² ILO, ‘Trade Unions Against Trafficking’, ILO, retrieved 10 April 2015, http://www.ilo.org/wcmsp5/groups/public/-asia/-ro-bangkok/documents/publication/wcms_099891.pdf

developed by some unions, like the General Federation of Nepalese Trade Unions (GEFONT), which works in conjunction with the ITUC and BWI on trafficking and migration. As part of this work, GEFONT has organised trainings on forced labour and trafficking for domestic workers and collaborated with trade unions in destination countries such as Malaysia.⁶³ However, forced labour remains a peripheral issue for most local unions.

As this suggests, the ITUC's optimistic assertion that efforts to reduce forced labour can be incorporated into trade unions' existing work belies the fact that unions' willingness and capacity to address it may be severely limited, even where forced labour occurs in sectors with a union presence. More fundamentally, it ignores the fact that the limits of trade union reach beyond the confines of what is in global southern contexts a very small formal sector, even where unions enter into alliances with government agencies or NGOs. Thus, while the ILO and elements of the international labour movement have had considerable success in getting forced labour on the policy agenda, beyond isolated examples there remains serious doubt that trade unions can have a substantive impact on the prevalence of forced labour through political, solidarity or even industrial initiatives, particularly in the global south.

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⁶³ J Beirnaert, 'Training on Human Trafficking and Forced Labour in Nepal', ITUC, 2012, retrieved 10 April 2015, <http://www.ituc-csi.org/training-on-human-trafficking-and,11565>; V Longhi, 'The Nepali Trade Union Federation—Ensuring Safe Migration', *The Guardian*, 18 October 2013, retrieved 10 April 2015, <http://www.theguardian.com/global-development/2013/oct/18/human-trafficking-stories-anti-slavery-day>

Deploying Disclosure Laws to Eliminate Forced Labour: Supply chain transparency efforts of Brazil and the United States of America

Ashley Feasley

Abstract

States are increasingly addressing forced labour in supply chains by implementing transparency or disclosure measures that aim to make companies disclose the existence of forced labour in their supply chains. Examining the recent approaches of Brazil and the United States of America shows some promising practices to best inform governmental policy going forward.

Keywords: forced labour, supply chain, legislation, transparency, Brazil, United States of America

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Introduction

In response to growing awareness about the pervasiveness of forced labour in global supply chains, governments have engaged in efforts to regulate companies' and governments' supply chains. Forced labour¹

¹ Forced labour is defined in: ILO, *C029—Forced Labour Convention, 1930 (No. 29)*, *Convention concerning Forced or Compulsory Labour*, 28 June 1930, and ILO, *C105—Abolition of Forced Labour Convention, 1957 (No. 105)*, *Convention concerning the Abolition of Forced Labour*, 25 June 1957. Article 1(1) of the former states forced labour is 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not

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enslaves women, men, and children globally into manual labour, sexual servitude and debt bondage. According to the International Labour Organization (ILO), forced labour in the global private economy generates profits of USD 150 billion a year.² Some of these profits derive from production and consumption of goods that have forced labour in product supply chains.

This article aims to evaluate the efforts of the Brazilian and United States of America (US) governments to create and implement supply chain transparency disclosure laws. Brazil and the US are engaged in legislative and administrative action to implement disclosure and transparency measures to eliminate forced labour from supply chains. The approaches of the US and Brazil take disparate forms. Brazil has worked to combat forced labour through internal and domestic operations with a focus on products and production carried out within Brazil. In contrast, the US approaches the elimination of forced labour with a focus on goods and services produced abroad and domestically. Brazil utilises the publication of a national *lista suja* or 'Dirty List' of companies which have been found to have forced labour in their supply chains. The Brazilian government reinforces the viability of the Dirty List through investigations, sanctions such as bank-lending penalties, and business adherence through a voluntary pact that some businesses have joined. The US has federal disclosure requirements on conflict minerals, an executive order overseeing the federal government's supply chain, and a state-level supply chain disclosure law, but has yet to enact a federal disclosure law specifically targeting forced labour in supply chains. The level of government ownership and enforcement of supply chain disclosure regulation, and business community acceptance of regulation are key indicators of successful engagement.

offered himself voluntarily.' The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) provided guidance on the definitional scope of forced labour, stating forced labour encompasses trafficking in persons for the purpose of labour and sexual exploitation, as defined by the United Nations (UN) Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children. CEACR, 'Eradication of forced labour: General survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105)', Report III (Part 1B), International Labour Office, 2007, para. 77.

² ILO, 'Profits and Poverty: The economics of forced labour', International Labour Office, 2014, retrieved 2 August 2015, http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_243391/lang-en/index.htm

Section I discusses the evolving human rights and corporate social responsibility movements that aim to regulate business conduct, including forced labour in supply chains. Section II reviews the Brazilian government's approach to eradicate forced labour from supply chains, centered around the Dirty List, and comprising engagement with business community, financial penalties and law enforcement work to investigate non-complying companies, and includes updates on the recent suspension of the Dirty List. Section III examines the US government's approach to utilising supply chain legislation to eliminate forced labour. The US effort, in comparison to Brazil's efforts since the early 2000s, has not had as much engagement with the business community, but has been progressive in issuing regulations regarding the supply chains and procurement practices of the US federal government and is showing signs of progress with other initiatives. Combating forced labour through supply chain transparency regulation is still a new concept for governments to embrace. A review of both countries' efforts is useful as it highlights best practices and approaches to compel companies to eliminate forced labour from supply chains.

I. Corporate Responsibility to Address Forced Labour

Increasingly companies found to produce, source and sell products that utilise forced labour are facing international pressure in the form of negative publicity and boycotting to clean up their supply chains. These actions among others have created an opening for evaluating the responsibilities of businesses to honour human rights. International human rights instruments have traditionally addressed the conduct of governments. When the international system did address transnational corporations, it was in the context of restrictive or corrupt business practices, and largely ignored the obligations a corporation might have to protect human rights.³ Recently, transnational corporations have begun to face legal consequences for human rights abuses as the international human rights community increasingly turns its attention to multinational corporations' role and responsibility in respecting human rights.⁴ Part of

³ R Steinhart, 'Corporate Responsibility and the International Law of Human Rights: The new *lex mercatoria*' in P Alston (ed.), *Non-State Actors and Human Rights*, Oxford University Press, 2005, pp. 177–227.

⁴ See for example: *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002), reh'g en banc, 395 F.3d 978 (9th Cir. 2003).

the new focus on accountability for non-governmental actors, including corporations, can be attributed to the shifting purview of human rights bodies and growing recognition of the global power and reach of corporations. To this end, the principle that businesses have a responsibility to respect human rights such as addressing forced labour in supply chains has gained unprecedented acceptance over the past decade: by the international legal community—through the creation of the United Nations (UN) Global Compact⁵ and adoption of the Guiding Principles on Business and Human Rights,⁶ by governments⁷ and corporations.⁸ Yet differences regarding how, by whom, and to what degree corporations are to be regulated in order to ensure that global supply chains are free of forced labour remain. Corporations are making efforts to address forced labour in supply chains through the implementation of voluntary codes of conduct, transparent sourcing programmes, and other corporate social responsibility (CSR) initiatives.⁹ States are attempting to address forced labour in supply chains through transparency and disclosure regulations.

II. Brazil's Supply Chain Disclosure Approach

With extensive agricultural, construction and garment industries in urban and rural areas, forced labour has long been prevalent in Brazil. Human-rights-focused activism of the 1990s, building on the anti-military government civil society movement of the 1970s, catapulted the issue

⁵ The UN Global Compact is an initiative to encourage corporations to commit to human rights principles. The effective abolition of forced labour is Principle 4 among ten principles to be upheld by businesses. UN Global Compact, 'The Ten Principles of the UN Global Compact', UN Global Compact, retrieved 2 August 2015, <https://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>

⁶ The UN Secretary-General's Special Representative for Business and Human Rights, John Ruggie, produced the Guiding Principles on Business and Human Rights, which were endorsed by the UN Human Rights Council in 2011. The Guiding Principles provide an authoritative global standard for business conduct related to human rights.

⁷ For example, Finland, Germany, The Netherlands and the United Kingdom have national action plans on business and human rights.

⁸ Over 8,000 businesses from approximately 145 countries have signed the UN Global Compact.

⁹ Kimberley-Clarke, 'UNGC Index', retrieved 2 August 2015, <http://www.sustainabilityreport2010.kimberly-clark.com/gri-ungc-index/ungc-index.asp>; SAB Miller, 'Reporting in accordance with the GRI and progress in implementing the UN Global Compact Principles', retrieved 2 August 2015, <http://www.sabmiller.com/docs/default-source/sustainability-documents/gri-ungc-table-2014.pdf?sfvrsn=2>; Total, 'Global Compact', retrieved 2 August 2015, <http://csr-analysts.total.com/reporting-standards/global-compact>

of forced labour onto the international stage. In 1994, a Brazilian person in forced labour lodged a criminal complaint with the Inter-American Commission on Human Rights of the Organization of American States and the Brazil eventually accepted responsibility for the incident.¹⁰ The case, coupled with media and awareness advocacy campaigns and the electoral success of Partido dos Trabalhadores in the 2002 presidential victory of Luiz Inácio Lula da Silva, helped to contribute to changes in the Brazilian government's response to forced labour. Although, as discussed in the following section, efforts to address labour exploitation began to be addressed in the mid-1990s.

A. Investigative and Civil Society Coordinating Capability: Mobile Inspection Groups and the National Commission to Eradicate Slave Labour

In 1995, the Brazilian government created Special Mobile Inspection Groups (GEFM) operating out of the Ministry of Labour and Employment (MTE) to investigate incidences of forced labour throughout Brazil.¹¹ GEFM, the implementation vehicle behind the Brazilian government's effort to eradicate forced labour, has a primary responsibility to monitor forced and child labour cases through investigation, unscheduled visits and civil society cooperation.¹² As a result of GEFM's work, the Brazilian government reports approximately 44,000 workers were rescued from forced labour or slavery-like work between 1995 and 2012.¹³ In July 2015, GEFM announced it will begin using drones equipped with cameras to monitor hard-to-reach areas. The drone pilot programme will start in Rio de Janeiro state and will be expanded to other states.¹⁴

¹⁰ Inter-American Commission on Human Rights, 'Report on Amicable Solution No. 95/03', Case 11,289, José Pereira-Brasil, 2003 (unpublished).

¹¹ P Costa, 'Fighting Forced Labour: The example of Brazil', International Labour Office, 2009, pp.4-8.

¹² US Department of State, '2011 Human Rights Reports: Brazil', retrieved 2 August 2015, <http://www.state.gov/j/drl/rls/hrrpt/2011/wha/186495.htm>

¹³ F Ortiz, 'Face of Slave Labour Changing in Brazil', Inter Press Service News Agency, 30 April 2014, retrieved 21 August 2015, <http://www.ipsnews.net/2014/04/face-slave-labour-changing-brazil/>

¹⁴ A Brasileiro, 'Brazil will use drones to fight slave labor in rural areas', *Reuters*, 28 July 2015, retrieved 2 August 2015, <http://www.reuters.com/article/2015/07/28/us-brazil-slavery-drones-idUSKCN0Q226F20150728>

In addition to designating GEFM to investigate, the government created the National Commission to Eradicate Slave Labour (CONATRAE) to coordinate government efforts to combat forced labour in 2003. CONATRAE also provides a forum for civil society input. The first National Plan for the Eradication of Forced Labour was initiated in 2003, and codified policies on labour inspection. It contains short and long-term objectives to guide governmental and civil society action.¹⁵ The National Plan was updated in 2007 and continues to provide long and short-term objectives for government, business, and civil society to jointly work on to eradicate forced labour.

B. Lista Suja: The Dirty List

In 2004, Brazil introduced legislation that would effectively ‘name and shame’ companies who used forced labour in their supply chains. MTE Decree No. 540/2004 created a register of names of employers caught by GEFM exploiting workers in conditions analogous to slavery. The names are published on a national Dirty List, which is searchable and updated every six months.¹⁶ Further information on the list includes the owner of the offending company, the location of the offense, the product cultivated, and the number of workers subjected to forced labour.¹⁷ The last published recent Dirty List included 609 corporations and individuals.¹⁸

The process for assessing whether a company should be on the list is largely a reactive one. Once a complaint is initiated, GEFM investigates the workplace. If the business creates obstacles to GEFM’s work, the MTE has the power to request to freeze company bank accounts as well as arrest those impeding the investigation. During the investigation the name of the business is kept confidential to increase the chances of an effective inspection. Maintaining the confidentiality of the company’s identity until and unless a company is proven guilty incentivises corporate

¹⁵ Presidency of the Republic of Brazil, ‘National Plan for Eradication of Forced Labor’, 2003, retrieved 2 August 2015, <http://portal.mte.gov.br/data/files/FF8080812B21345B012B2ABFC6A000ED/7338.pdf>

¹⁶ Repórter Brasil, retrieved 2 August 2015, <http://reporterbrasil.org.br/lista-suja/>

¹⁷ Repórter Brasil, ‘Lista Suja do Trabalho Escravo’, retrieved 2 August 2015, <http://reporterbrasil.org.br/listasuja/resultado.php>

¹⁸ N Bertrand, ‘Brazil Has A Brilliant Approach To Ending Modern-Day Slavery’, *Business Insider*, 17 November 2014, retrieved 21 August 2015, <http://www.businessinsider.com/how-brazil-shames-companies-that-enslave-people-2014-11#ixzz3jJibIVH>

compliance as the list is seen as more than symbolic ‘naming and shaming’—instead it represents a real investigation. If it is determined that workers are subjected to forced labour conditions, the business is prosecuted by GEFM labour inspectors. The charges are sent to MTE for administrative review. A guilty verdict may require the offending business to pay fines. Only businesses found guilty will have their names included on the Dirty List.¹⁹

When a company is placed on the list, it is monitored for two years and cannot have its name removed until it has paid its fines and restitution and has not committed recent instances of forced labour. If these criteria are met, the offending company’s name is taken off the list. The process of identifying companies to be included in the Dirty List has been considered thorough and legitimate by all parties (corporations and consumers), which lent credibility to the list from its inception, though as discussed below this credibility has suffered in recent times.

C. Penalties Related to Inclusion on the Dirty List

Adherence to the Dirty List has been reinforced by both business and international human rights communities. The National Pact for the Eradication of Slave Labour (Pact) has assisted in solidifying business support, but there was initial business opposition to the Pact. In 2004, the ILO and Ethos Institute for Business and Corporate Social Responsibility began conducting meetings with identified companies to convince business leaders that the Pact would be good for business because it would give Brazil global recognition for effectively combating forced labour and would increase the value of the national product in the international market.²⁰ In 2005, the Pact was created as a voluntary multi-stakeholder initiative²¹ and engages national and international signatory companies to maintain slavery-free supply chains. Organisations that sign

¹⁹ Costa, p. 89.

²⁰ Instituto Pacto Nacional History pela Eradacao de Trabaho Escravo, ‘Histórico’, retrieved 2 August 2015, <http://www.inpacto.org.br/inpacto-2/historia/>; S Aaronson and J Zimmerman, *Trade Imbalance: The struggle to weigh human rights concerns in trade policymaking*, Cambridge Press, New York, 2007.

²¹ ILO, ‘Slave Labour: It’s time to end this shame once and for all’, ILO, 2005, retrieved 2 August 2015, http://www.ilo.org/wcmsp5/groups/public/—dgreports/—ilo-washington/documents/genericdocument/wcms_189835.pdf

the Pact commit themselves to not collaborating with companies named on the Dirty List. When companies who have signed the Pact are confronted with concrete evidence of other businesses involvement with forced labour via the Dirty List they must either end business dealings with the offending corporation or risk negative publicity.²² In this way, the Pact is innovative in its vision of shared responsibilities for labour rights violations, going beyond companies to supplier and outsourcing networks. As a result, the Pact functions as a transnational instrument that can cripple a company's key asset, its public image.²³ In 2013, 380 corporations, accounting for 30% of Brazil's gross national product, had signed onto the Pact.²⁴

When the threat of bad publicity from non-compliance with the Pact does not spur responsible sourcing, the business community's use of a company's presence on the Dirty List as a reason to deny them funding has increasingly proven to be the most effective weapon to ensure forced-labour-free supply chains. Public and private financial institutions, including the Banco do Brasil, the Banco da Amazônia, the Banco do Nordeste and the Brazilian Development Bank (BNDES), have all refused credit to companies included on the Dirty List. Brazilian government officials have noted that for businesses this is the biggest penalty.²⁵ Bank actions denying credit reflect the unwillingness of financial institutions to associate publicly with forced labour violators.

Complementing the Brazilian business communities' actions, the government has utilised additional measures targeting blacklisted companies. For example, a governmental decree from the Ministry of National Integration Decree No. 1.150 recommends that financial bodies refrain from granting financial assistance companies who appear on the Dirty List. While no sanctions exist for those banks that offer credit to blacklisted companies, Decree No. 1.150 nonetheless gives guidance to

²² Instituto Pacto Nacional History pela Eradacao de Trabaho Escravo.

²³ L Carstensen and S McGrath, 'The National Pact to Eradicate Slave Labour in Brazil: A useful tool for unions?' *Global Labour Column*, 2012, retrieved 2 August 2015, <http://column.global-labour-university.org/2012/12/the-national-pact-to-eradicate-slave.html>

²⁴ Walk Free, 'Brazil: Global slavery index 2014', retrieved 2 August 2015, <http://www.globallslaveryindex.org/country/brazil/> ; ILO, Slave Labour.

²⁵ Associated Press, 'More employers in Brazil accused of slave-like conditions', *USA Today*, 3 January 2012, retrieved 2 August 2015, <http://usatoday30.usatoday.com/news/world/story/2012-01-03/brazil-slave-labor-employers/52363518/1>

lending institutions and is a good example of the complementary regulation enacted to bolster the impact of the Dirty List and incentivise business community adherence.²⁶ Businesses included on the Dirty List are also excluded from competing for new projects within public programmes like the housing programme *Minha Casa Minha Vida*.²⁷ Lastly, in June 2014, Brazil adopted a constitutional amendment to allowing the government to confiscate property, without compensation, when forced labour is found to have been used.²⁸

D. Recent Resistance to the Dirty List

Despite the progress in eradicating forced labour the Brazilian government has recently encountered obstacles in maintaining the integrity of the Dirty List, particularly in the form of business backlash and legal action.²⁹ The controversies surrounding OAS SA and MRV Engenharia, both companies placed on the Dirty List, illustrate the government's struggle with business on a micro-level, and the suspension of the Dirty List by the Brazilian Chief Justice demonstrates businesses' increasingly advanced strategies to stymie the mechanism.

1. OAS SA and MRV Engenharia

OAS SA helped build two stadiums for the 2014 World Cup. From June-October 2013, GEFM agents and prosecutors monitored OAS SA construction sites and found evidence of forced labour in Minas Gerais.³⁰ OAS SA was placed on the Dirty List in July 2014. This was notable given Brazil's participation in the Commitment for Decent Work for the World Cup and the fact that OAS SA was one of the official

²⁶ Costa, pp. 89–93.

²⁷ W Zocchio, 'Banco do Brasil é processado por trabalho escravo em obras do Minha Casa, Minha Vida', *Repórter Brasil*, 17 September 2013, retrieved 22 August 2015, <http://reporterbrasil.org.br/2013/09/banco-do-brasil-e-processado-por-trabalho-escravo-em-obras-do-minha-casa-minha-vida/>

²⁸ Emenda Constitucional #81 at http://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc81.htm ; Senate Bill 432 of 2013 at http://www.senado.gov.br/atividade/materia/detalhes.asp?p_cod_mate=114895

²⁹ For example, in 2012 there was an unsuccessful constitutional legal challenge to the validity of the Dirty List brought by the National Confederation of Brazilian Agriculture. 'Case questioning constitutionality of Slave Labor Blacklist is dropped by STF', 11 April 2012, <http://conectas.org/en/actions/justice/news/case-questioning-constitutionality-of-slave-labor-blacklist-is-dropped-by-stf>

³⁰ A Brasileiro, 'World Cup stadium builder added to Brazil's slave labour "Dirty List"', *Thomson Reuters Foundation*, 4 July 2014, retrieved 21 August 2015, <http://www.trust.org/item/20140704074731-3ih6d/>

builders for the event.³¹ Shortly thereafter, OAS SA obtained a court order to have its name removed from the Dirty List. The removal of OAS SA from the list is a sign of the its ineffectiveness in the face of business opposition and legal challenge, however, the incident also illustrates the business community's recognition that appearing on the Dirty List has negative consequences. These negative consequences, namely the bad publicity, fines and loss of lending opportunities, have driven businesses to try to close the Dirty List. Ironically, it is these enforcement mechanisms and governmental support that made the Dirty List an international model. Businesses which have been negatively affected have spoken of the power and the crippling financial consequences of the Dirty List. 'There are undeniable impacts on a company's image,' stated Rubens Menin Teixeira de Souza, founder and president of MRV Engenharia, a large real estate development company that has appeared on the Dirty List four times.³² Like OAS SA, MRV Engenharia has obtained injunctions to have its name removed. In 2013, the company's financing contracts were suspended by Caixa Econômica Federal for appearing on the list and it had to pay USD 6.7 million in fines.

2. Suspension of the Dirty List

Likely in response to continued financial penalties, certain industries have recently made a concerted effort to end the Dirty List. In December 2014, Brazilian President of the Supreme Court, Ricardo Lewandowski, granted an injunction suspending the publication of the Dirty List. The ruling stemmed from a constitutionality claim brought by the Brazilian Association of Real Estate Developers (Associação Brasileira de Incorporadoras Imobiliárias) on grounds that the Dirty List should be codified under law instead of inter-ministerial ordinance and that administrative appeals procedures for challenges to the labour inspections did not ensure the right to a fair hearing.³³ The

³¹ 'World Cup 2014: Pact for decent work launched in Sao Paulo', Building and Wood Worker's International, <http://www.bwint.org/default.asp?index=5140> The Pact requires all signatories respect the labour rights established by the ILO Conventions, including prevention of forced labour.

³² C Costa, 'Government 'dribbles' STF and creates new list of slave labour', *BBC Brazil*, 6 April 2015, retrieved 21 August 2015, www.bbc.co.uk/portuguese/noticias/2015/04/150331_lista_trabalho_escravo_cc

³³ M Silva and C Bäfero, 'Brazil: Blacklist of slave labour in Brazil—Renewal of labour regulation', Mondaq, 11 May 2015, retrieved 2 August 2015, <http://www.mondaq.com/x/396372/employee+rights+labour+relations/Blacklist+of+Slave+Labor+in+Brazil+Renewal+of+Labor+Regulation> ; <http://reporterbrasil.org.br/2015/03/confira-a-nova-lista-suja-do-trabalho-escravo/>

decision was issued during the holiday recess by the Chief Justice only and garnered negative press internationally.³⁴

After a three-month suspension, a new Dirty List was promulgated on 31 March 2015, through an inter-ministerial ordinance signed by MTE and the Secretariat of Human Rights. The new Dirty List was slated to be released in April, but this has not yet happened. The Brazilian government has stated that the new Dirty List is being finalised and is waiting for Supreme Court authorisation to release the list.³⁵ There are claims that the new list is complete, but that there is internal pressure within the government and from businesses to delay publication of the list.³⁶

Whilst the Brazilian government publically displayed resolve in the face of business opposition and continued to support the Dirty List, the delay in publically releasing the list has resulted in less meaningful enforcement and signals more tentative government support compared to earlier years. Importantly for businesses, the financial threats of restricted lending due to presence on the Dirty List have softened. Since the Dirty List is no longer available, BNDES and Caixa Econômica Federal (another Brazilian bank) guided their employees to stop using it as a consideration when examining loan applications. Instead, the two banks claim to be using other criteria to ensure that companies applying for capital are not using forced labour, though they have not disclosed those mechanisms.³⁷ The longer the government delays in issuing the new list, the more incentivised businesses are to oppose it, as they benefit from more lenient financing criteria. The situation with the Dirty List is still unfolding, but much has been done to eviscerate the effectiveness of the Brazilian model in the past year. The mounting pressure and legal attacks by business interests have sidelined the Dirty List, a key part of an international model of a programme against forced labour. For the Brazilian model to successfully continue, the government must publicise and robustly defend the Dirty List and reinstate financial penalties for non-complaint companies.

³⁴ Office of the High Commissioner for Human Rights (OHCHR), 'Human Rights Council concludes general debate on the promotion and protection of all human rights', OHCHR, 2015, retrieved 2 August 2015, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15698&LangID=E#sthash.vla6nwoZ.dpuf> ; http://www.conectas.org/arquivos/editor/files/Conectas_RB_Statement%20Lista%20Suja%20-%2013_03.pdf

³⁵ Email with C Costa, BBC Reporter, 3 August 2015, on file with the author.

³⁶ Interview with C Costa, BBC Reporter, 22 May 2015.

³⁷ Interview with C Costa, BBC Reporter, 22 May 2015.

In contrast to Brazil, disclosure regulation to combat forced labour in supply chains is a newer regulatory concept in the US. I will now evaluate the US regulatory framework in order to evaluate the benefits and pitfalls of the US model.

III. Supply Chain Transparency in the US

While there have been legislative measures to combat child labour,³⁸ and efforts to monitor products made by child or forced labour,³⁹ disclosure legislation specifically aimed at companies' supply chains did not become law in the US until 2010. In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act [hereinafter Dodd-Frank]⁴⁰ and California enacted the California Transparency in Supply Chains Act (CTSCA).⁴¹ Dodd-Frank is a federal law that applies to all US states. The CTSCA only applies to companies doing business in California. In addition to Dodd-Frank and CTSCA, there are two recent federal forced labour supply chain transparency efforts that bear note: the Business Supply Chain Transparency on Trafficking and Slavery Act of 2014 (HR 4842) and Executive Order 13627 Strengthening Protections Against Trafficking in Persons in Federal Contracts (EO 13627). HR 4842 was proposed federal legislation in the 113th Congress. EO 13627 is an executive order that applies to the US federal government by presidential decree.

A. Conflict Minerals Disclosure Legislation: Section 1502 of the Dodd-Frank Act

Dodd-Frank focuses on financial service reforms. However Section 1502 mandates publically-traded companies to annually report to the Securities

³⁸ The Sanders Amendment of 1997, offered to the Tariff Act of 1930 prohibited the importation of goods created by forced labour. The Tariff Act was amended again in 2000 to specifically include prohibitions against goods created by forced or indentured child labour. H. Amdt. 368 to 19 U.S.C. 1307—105th Congress (1997–1998) agreed to by voice vote, 7 September 1997; Trade and Development Act of 2000, 19 U.S.C. § 1307 (2006).

³⁹ Trafficking Victims Protection Reauthorization Act of 2005, Public Law 109–164 (2006), mandated the Department of Labour develop and make available to the public a list of goods from countries that it has reason to believe are produced by forced labour or child labour in violation of international standards.

⁴⁰ Dodd-Frank Wall Street Reform and Consumer Protection Act Pub. L. No. 111–203, 124 Stat. 1376 (2010).

⁴¹ California Transparency in Supply Chains Act of 2010, ch. 556, 2010 Cal. Stat. 2641 (codified at CAL. CIV. CODE § 1714.43).

and Exchange Commission (SEC) and disclose use of ‘conflict minerals’ from the Democratic Republic of Congo (DRC) in their supply chains.⁴² Section 1502 does not explicitly address forced labour, however, it is a federal law that utilises supply chains disclosure, and as such it is important to evaluate it as a first step in the US regulatory regime.

The issues encountered in implementing Section 1502 are useful to examine as they reflect some of the existing impediments to supply chain transparency legislation eliminating forced labour. The response to Section 1502 from two key stakeholders, the business community and the implementing government agency, has been mixed.⁴³ The business community has resisted and continues to do so through a legal battle that has resulted in delays to full implementation of Section 1502. The US Securities and Exchange Commission (SEC), the government agency tasked with implementation, has at times seemed uncertain in its support of the regulation.

SEC officials initially struggled to translate Section 1502’s accompanying rules into regulations. The SEC first issued proposed regulations in December 2010 and received over 13,000 comment letters.⁴⁴ In response, the SEC altered early drafts of the rules and pushed back deadlines. The delay signaled to opposition groups that procedural tactics could be effective in undermining implementation. In August 2012, the SEC issued the final rule accompanying Section 1502. In protest, business groups filed a lawsuit requesting a modification or set-aside of the rule. In July 2013, a federal district court found the final rule viable.⁴⁵ The business plaintiffs appealed the decision and achieved a partially successful result

⁴² Dodd-Frank § 1502, 124 Stat. at 2213 (codified at 15 U.S.C. § 78m(p)) (Supp. V 2011) “Conflict minerals” is defined as (A) columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives; or (B) any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the [DRC] or an adjoining country.’ § 1502(e)(4)(A)–(B). See also: International Conference on the Great Lakes Region and Organisation for Economic Co-operation and Development, ‘Regional Certification Mechanism Certification Manual, Mineral Certification Scheme of the International Conference on the Great Lakes Region (ICGLR)’, retrieved 2 August 2015, <http://www.oecd.org/investment/mne/49111368.pdf>

⁴³ M Seitzinger and K Ruane, ‘Conflict Minerals and Resource Extraction: Dodd-Frank, SEC regulations, and legal challenges’, Congressional Research Service, 2015, retrieved 2 August 2015, <http://fas.org/sgp/crs/misc/R43639.pdf>

⁴⁴ Proposed Rule: Conflict minerals, SEC, <http://www.sec.gov/comments/s7-40-10/s74010.shtml>

⁴⁵ National Association of Manufacturers et. al. v. SEC, Civil Action No. 13-cv-635 (Opinion), 2013, retrieved 2 August 2015, <https://www.sec.gov/rules/final/2014/34-67716-opinion.pdf>

with parts of the rule deemed to be violative of the First Amendment. While large portions of Section 1502 are now in effect, part of the rule is still not finalised as the SEC requested and received a rehearing. Four years after enacting Dodd-Frank, corporate opposition to Section 1502 has prevented consistent implementation. On August 18, 2015, the US Court of Appeals for District of Columbia upheld the First Amendment violation. The ruling still largely upholds Section 1502, making companies conduct due diligence and file reports to SEC, but companies are not required to say whether the products are conflict free. The delays illustrate the power of organised corporate resistance to supply chain disclosure regulations in the US.⁴⁶ The decision marks the second time that the three-judge panel has reviewed the regulator's conflict minerals rule. In this way, the US and Brazil now share a common obstacle: pushback from corporate interests through litigation. While US business interests did not succeed in preventing Section 1502 from becoming law, they have delayed implementation. This tactic seems to have also taken hold in Brazil.

In addition to opposition from the business community, the SEC has seemed hesitant to use its mandatory disclosure powers to monitor supply chains. Many within the organisation were concerned as to whether the SEC had the expertise or the actual ability to undertake such a task. Mary Schapiro, former SEC Chairperson, has acknowledged that the SEC lacked expertise in the area.⁴⁷ SEC Chair Mary Jo White questioned the use of SEC disclosure powers to exert pressure on companies to change behaviour, stating:

Seeking to improve safety in mines for workers or to end horrible human rights atrocities in the Democratic Republic of the Congo are compelling objectives, which, as a citizen, I wholeheartedly share. But, as the Chair of the SEC, I must question, as a policy matter, using the federal securities laws and

⁴⁶ S Lynch, 'US court backs companies' free speech over conflict minerals', *Reuters*, 18 August 2015, retrieved 21 August 2015, <http://www.reuters.com/article/2015/08/18/sec-court-conflictminerals-idUSL1N10T14920150818>

⁴⁷ C Taylor, 'Conflict Minerals and SEC Disclosure Regulation', *Harvard Business Law Review Online*, vol. 2, 2012, retrieved 2 August 2015, <http://www.hblr.org/?p=1820>

the SEC's powers of mandatory disclosure to accomplish these goals.⁴⁸

Such comments call into question the SEC's willingness to enforce supply chain regulations and contrast the Brazilian MTE's investigative and administrative work related to the Dirty List. The SEC's resistance to lead on this issue could result in a lack of meaningful implementation—negating the impact and purpose of supply chain disclosure legislation. Recent negative media reports about what is happening in the DRC as a result of Section 1502 bolster that idea.⁴⁹ Many advocates argue that the SEC has disclosure expertise and is best situated to take on this role if the US does decide to expand disclosure regulation to combating forced labour through supply chains. However, the current fight over Section 1502 demonstrates the need for both governmental agency and business community buy-in for successful federal supply chain legislation in the US.

In addition to the above-mentioned obstacles, reports on Section 1502's actual impact upon the DRC have been divergent and controversial. In 2010, in an effort to comply with Section 1502, DRC's government shut down the mining industry for six months and initiated a conflict mineral certification process. As of October 2014, eleven mines of approximately 900 in South Kivu, DRC, contained minerals classified as conflict-free.⁵⁰ Critics claim that Section 1502 incentivised international buyers to abandon the region and source minerals elsewhere.⁵¹ Proponents note that Section

⁴⁸ M J White, 'The Importance of Independence', speech at the 14th Annual A A Sommer, Jr. Corporate Securities and Financial Law Lecture, Fordham Law School, New York, 3 October 2013, retrieved 2 August 2015, http://www.sec.gov/News/Speech/Detail/Speech/1370539864016#.VH1Q6_ldW-G

⁴⁹ L Wolfe, 'How Dodd-Frank is Failing Congo', *Foreign Policy*, 2 February 2015, retrieved 2 August 2015, <http://foreignpolicy.com/2015/02/02/how-dodd-frank-is-failing-congo-mining-conflict-minerals/>; C Vogel and B Radley, 'In Eastern Congo, economic colonialism in the guise of ethical consumption?' *Washington Post*, 10 September 2014, retrieved 2 August 2015, <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/09/10/in-eastern-congo-economic-colonialism-in-the-guise-of-ethical-consumption/>

⁵⁰ S Raghavan, 'Obama's conflict minerals law has destroyed everything, say Congo miners', *The Guardian*, 2 December 2014, retrieved 2 August 2015, <http://www.theguardian.com/world/2014/dec/02/conflict-minerals-law-congo-poverty>

⁵¹ Various, 'An Open Letter', Christoph Vogel, 2014, retrieved 2 August 2015, <https://ethuin.files.wordpress.com/2014/09/09092014-open-letter-final-and-list.pdf>

1502 created a strong market incentive for change, resulting in major impact upon DRC conflict mines by interrupting long-standing industry practices of opacity in supply chains.⁵² Further debate about the success of Section 1502 seems to be intensifying⁵³ and threatens the political viability of future federal supply chain transparency measures in the US as politicians may find supply chain legislation politically unpalatable.

B. State-led Efforts: California Transparency in Supply Chains Act

The CTSCA was a positive state-level supply chain disclosure development. CTSCA applies to retailers or manufacturers doing business in California but it does not forbid the sale of goods produced through forced labour. Instead, the CTSCA requires that companies with annual gross receipts of USD 100 million doing business in California disclose their efforts to eradicate trafficking and forced labour in their direct supply chains.⁵⁴ Disclosure must be posted on the company's website homepage with an obvious and easily understood link. Covered companies must, at a minimum, disclose to what extent, if any, the retailer, seller, or manufacturer: (1) verifies company product supply chains to evaluate and address risks of human trafficking and forced labour and whether the verification was conducted by a third party; (2) conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and forced labour in supply chains; (3) requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding human trafficking and forced labour of the country or countries in which they are doing business; (4) maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding trafficking and forced labour; and (5) provides company employees and management, who have direct responsibility for supply chain management, particularly with respect to mitigating risks within the supply chains of products.⁵⁵

⁵² Various, 'Open Letter Conflict Minerals: A broader push for reform is essential', Enough Project, 2014, retrieved 2 August 2015, http://www.enoughproject.org/files/OpenLetterConflictMinerals_October_2014.pdf

⁵³ For example, countries that are economically impacted by Dodd-Frank are considering bringing a suit against the US through the World Trade Organization on the grounds that Section 1502 violates rules of trade. L Wolf.

⁵⁴ CTSCA, ch. 556, 2010 Cal. Stat. 2641 (codified at CAL. CIV. CODE § 1714.43).

⁵⁵ CTSCA at § 1714.43(3)(a)(1)-(3)(c)(1-5).

As the CTSCA does not criminalise the existence of forced labour within a company's supply chain, its primary benefit is that it mandates the disclosure of information about forced labour and human trafficking to consumers.⁵⁶ Despite mandating disclosure of information, the CTSCA does not contain details as to what constitutes adequate compliance for eliminating forced labour from a supply chain. As a result, some corporations interpreted the CTSCA facially and reported that their companies were not taking any measures to eradicate or monitor human trafficking and forced labour in their supply chains. The remedy for a company's inaction or violation of CTSCA is injunctive relief to compel compliance filed by the California Attorney General. Whilst an injunction can be a useful contractual remedy, it is a mild deterrent for non-disclosure of the existence of forced labour in a company's supply chain. The lack of legal ramifications, regulatory incentives or penalties weakens the CTSCA's power and purpose and disincentivises companies from investigating their supply chains and implementing strategies to eradicate forced labour. Recently, the Attorney General's (AG) office issued letters to over 1,700 eligible companies requiring them to notify the office whether they are CTSCA-compliant.⁵⁷ Additionally the AG created a resource guide for prospective CTSCA filers to provide compliance guidance.⁵⁸ The AG's recent actions demonstrate that there will likely be more enforcement-minded efforts to ensure CTSCA compliance in the future.

C. Recent Federal Legislative and Administrative Supply Chain Efforts

Despite the successful passage of the CTSCA, recent efforts at the federal level to enact supply chain disclosure legislation have failed. HR 4842, a federal bill that aimed to eliminate modern slavery, human trafficking, forced and child labour through supply chain disclosures, was introduced with bipartisan support in June 2014 by Representatives Carolyn Maloney (D-NY) and Chris Smith (R- NJ). Like Section 1502 of Dodd-Frank,

⁵⁶ Ibid., § 1743.43.

⁵⁷ C Navarro, 'California Enforces Supply Chain Disclosure Law', Hogan and Lovells: Focus on regulation, 2015, retrieved 2 August 2015, <http://www.hlregulation.com/2015/05/06/california-enforces-supply-chain-disclosure-law/>

⁵⁸ K D Harris, 'The California Transparency in Supply Chains Act: A resource guide', California Department of Justice, 2015, retrieved 2 August 2015, <http://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf>

HR 4842 relied on companies reporting to the SEC and consumer policing. HR 4842 required companies with annual worldwide global receipts greater than USD 100 million to report to the SEC and make publicly available on their websites information describing any measures taken to identify and address conditions of forced labour, slavery, human trafficking and child labour within their supply chains. The disclosures would have also required companies to describe: risks identified within the supply chain and measures taken towards eliminating risks; whether audits of supply chains were conducted by third parties; whether outside labour organisations and non-governmental organisations (NGOs) were consulted in the audit process; and whether working conditions and labour practices of upstream suppliers were examined to verify whether such suppliers have appropriate systems to identify risks within their own supply chains. In contrast to Section 1502, HR 4842 did not rely on the SEC to determine compliance criteria, instead it required the SEC and the US State Department to develop regulations together and share subject matter expertise on forced and child labour, human trafficking and modern slavery. The inclusion of the State Department reflects a positive advancement of the development of US supply chain legislation policy, as it reflects an attempt to utilise the State Department's expertise.

HR 4842 faced similar but less publicised obstacles to becoming federal law that Section 1502 of Dodd-Frank has faced in final rule issuance. Most notably there was concern about having the SEC as the implementing government agency. Earlier drafts of HR 4842 had the Department of Labour, not the SEC, as the implementing agency. However in the final version the SEC was the designated government agency. Additionally, there was not much support for HR 4842. Even with a broad coalition of faith-based groups, NGOs and labour and worker rights groups supporting the introduction of the bill, HR 4842 only gained a total of four sponsors out of a possible 435 sponsors.

Despite the limited Congressional support for HR 4842 during the 113th Congressional session, US legislators have plans to reintroduce a new version of the bill in the 114th Congressional session on 27 July 2015, HR 3226. The bill again assigns the SEC as the implementing governmental agency. Positively, for the 114th Congressional session, the legislation has been introduced in both the Senate (a companion bill to HR 3226, S. 1968 was introduced on August 5, 2015) and the House of Representatives, whereas HR 4842 was only introduced in the House of

ANTI-TRAFFICKING REVIEW 5 (2015): 30-49

Representatives. Additionally, the new House version of the bills was introduced earlier in the legislative session, which creates more opportunity to gather legislative sponsors. The increased interest in supply chain transparency legislation by Congress illustrates a hopeful forward path on federal US legislative efforts, and could signal that the SEC may be more willing to take on supply chain transparency regulatory efforts in the future.

In addition to supply chain disclosure legislation, there are new federal administrative supply chain transparency efforts related to government procurement implemented by the government. The recent Presidential Executive Order 13627: Strengthening Protections Against Trafficking in Persons in Federal Contracts applies supply chain transparency disclosure principles to US government procurement and represents a best practice in regards to governmental self-regulation. As EO 13627 is focused on government procurement, it centres on the purchase of goods and services but also focuses on efforts to ensure suppliers monitor their own supply chains in which goods and services are purchased as production inputs.

EO 13627, signed by President Barack Obama in September 2012, aims to curb human trafficking and forced labour in all US federal contracting. As the US federal government is the largest single purchaser in the global economy, the scope of EO 13627 is extensive. EO 13627 requires federal contractors and sub-contractors to take specific preventative measures to address and eliminate modern slavery in their supply chains. Certain aspects of EO 13627 are improvements upon existing US government supply chain and procurement policy. For example, the existence of a recruitment and wage plan that forbids recruitment fees being charged is a welcome protection that reflects growing knowledge about points along the federal procurement supply chain that have traditionally been the weakest. Lastly, EO 13627 requires the creation of a taskforce of relevant stakeholders in order to identify, adopt and publish appropriate safeguards guidance and compliance assistance to prevent trafficking and forced labour in federal contracting in identified areas. EO 13627 is a stellar example of the innovative transparency policy that can be undertaken in the US context when there is strong government support and a robust implementation mechanism.

IV. Conclusion

Analysis of Brazil and US governmental approaches in implementing supply chain disclosure regulations to eliminate forced labour maps the progress and setbacks that have occurred with states' regulatory efforts to clean up supply chains. Given recent developments, it is clear the viability and effectiveness of supply chain disclosure regulations to eliminate forced labour are still in-flux. As such, it is imperative that governments robustly support regulatory efforts. The early successes seen in Brazil illustrate the remarkable progress that can be achieved when government is invested in political support and enforcement. The delays and controversies surrounding implementation of Section 1502 of Dodd-Frank show the result when government is not aggressively engaged. With business opposition to supply chain disclosure likely to occur, it is necessary that governments and civil society work with businesses to create as much buy-in and positive incentives for cooperation as possible, but also employ true financial penalties for non-compliance. In Brazil, the Dirty List's power to impede financing opportunities for non-compliant businesses was critical; in the US there are no comparable penalties. In addition to having penalties, they must be meaningfully implemented. The recent setbacks in Brazil show the power of business opposition and the need for government support when business attacks such efforts. Without the Dirty List, businesses have not been required to address forced labour as in previous years and are also not penalised for failing to do so. Evaluating the Brazilian and the US approaches we still see much is in transition, but that government support and enforcement along with the engagement of businesses are necessary elements in supply chain disclosure laws working to eliminate forced labour.

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Asylum, Immigration Restrictions and Exploitation: Hyper-precarity as a lens for understanding and tackling forced labour

Hannah Lewis and Louise Waite

Abstract

The topic of forced labour is receiving a growing amount of political and policy attention across the globe. This paper makes two clear contributions to emerging debates. First, we focus on a group who are seldom explicitly considered in forced labour debates: forced migrants who interact with the asylum system. We build an argument of the *production* of susceptibility to forced labour through the United Kingdom's (UK) asylum system, discussing the roles of compromised socio-legal status resulting from restrictive immigration policy, neoliberal labour market characteristics and migrants' own trajectories. Second, we argue that forced labour needs to be understood as part of, and an outcome of, widespread normalised precarious work. Precarity is a concept used to describe the rise of insecure, casualised and sub-contracted work and is useful in explaining labour market processes that are conducive to the production of forced labour. Using precarity as a lens to examine forced labour encourages the recognition of extreme forms of exploitation as part of a wider picture of systematic exploitation of migrants in the labour market. To understand the reasons why forced migrants might be drawn into severe labour exploitation in the UK, we introduce the concept of *hyper-precarity* to explain how multidimensional insecurities contribute to forced labour experiences, particularly among forced migrants in the global north. Viewing forced labour as connected to precarity also suggests that avenues and tools for tackling severe labour exploitation need to form part of the wider struggle for migrant labour rights.

Keywords: refugees, asylum seekers, irregular migrants, forced labour, precarity, immigration policy

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Introduction

Forced labour has received growing attention in the United Kingdom (UK) in recent years and due to the passage of the Modern Slavery Act 2015 through parliament. It was estimated that there were 3,000–4,000 people in forced labour in the UK in 2013,¹ and while one of the first successful prosecutions under the new Section 71, Coroners' and Justice Act 2009, offence of forced and compulsory labour, slavery and servitude, concerned British-born young men (the 'Connors' case), it is generally agreed that migrants are most susceptible to exploitation in forced labour. The Modern Slavery Act 2015, while offering the potential to overhaul UK approaches to tackling multiple forms of trafficking and forced labour, is dominated by a continued emphasis on the detection and criminalisation of individual traffickers, with little attention to prevention or partnerships between non-governmental organisations (NGOs) and state actors.

In this article we argue that forced labour, rather than being considered an exceptional event, needs to be understood as part of and an outcome of processes of widespread normalised low-paid, insecure precarious work. We suggest that migrants' susceptibility is produced by multidimensional insecurities that produce hyper-precarity. Precarity is a concept used to describe the rise of casual, flexible, sub-contracted, temporary, contingent and part-time work in a neoliberal economy, which can help explain labour market processes that are conducive to the production of forced labour. Precariousness is also understood as a condition or experience of (ontological) insecurity² and as a platform to

¹ A Geddes, personal communication by email, 17 April 2014, based on A Geddes, G Craig and S Scott with L Ackers, O Robinson and D Scullion, 'Forced Labour in the UK', Joseph Rowntree Foundation, 2013.

² J Butler, *Precarious Life: The powers of mourning and violence*, Verso, London, 2004; M Oudenampsen and G Sullivan, 'Precarity and N/European Identity: (An interview with Alex Foti (ChainWorkers))', *Mute*, 2004, retrieved 20 August 2015, <http://www.metamute.org/editorial/articles/precarity-and-neuropean-identity-interview-alex-foti-chainworkers>

mobilise against insecurity.³ Distinguished from other similar terms such as vulnerability in the way in which it has become a symbol of struggle and action for insecure workers,⁴ precarity evokes the central role of forced labourers in resisting exploitation. This perspective offers the potential to connect efforts to tackle forced labour with the wider struggle for labour rights, avoiding the divisiveness and arguably counter-productive contradictions⁵ inherent to the separation of a small number of ‘deserving’ victims protected under anti-trafficking measures which paradoxically promote heightened border controls.

The article draws on a recent Economic and Social Research Council-funded project⁶ to understand experiences of forced labour among people who are seeking asylum in the UK. Hence, we also aim to highlight a migrant group not commonly considered under approaches to tackle trafficking and forced labour: refugees and people with a claim for asylum. Drawing on evidence gathered through in-depth interviews with thirty individuals at different stages of the asylum process with experiences of employment featuring forced labour practices, we outline how the situation of migrants at the intersection of precarious employment and immigration status can be understood as one of hyper-precarity.⁷ We suggest that the constrained choices facing migrants seeking a livelihood under hyper-precarious conditions may leave them with few options but to engage in severely exploitative work that meets international definitions of forced labour.

A first section outlines the Precarious Lives study and methodology. In a second section we consider the relationships between socio-legal status, asylum and forced labour and provide a typology for understanding the

³ B Neilson and N Rossiter, ‘FCJ-022 From Precarity to Precariousness and Back Again: Labour, life and unstable networks’, *The Fibreculture Journal*, 2005, retrieved 15 August 2011, <http://five.fibreculturejournal.org/fcj-022-from-precarity-to-precariousness-and-back-again-labour-life-and-unstable-networks/>

⁴ L Waite, ‘A Place and Space for a Critical Geography of Precarity?’, *Geography Compass*, vol. 3, issue 1, 2008.

⁵ J O’Connell Davidson, ‘New Slavery, Old Binaries: Human trafficking and the borders of “freedom”’, *Global Networks*, vol. 10, issue 2, 2010; B Anderson, ‘Where’s the Harm in That? Immigration enforcement, trafficking, and the protection of migrants’ rights’, *American Behavioral Scientist*, 2012.

⁶ Economic and Social Research Council (ESRC), ‘Precarious Lives: Asylum seekers and refugees’ experiences of forced labour’.

⁷ H Lewis, P Dwyer, S Hodkinson and L Waite, ‘Hyper-precarious Lives: Migrants, work and forced labour in the Global North’, *Progress in Human Geography*, 2014, online, DOI: 10.1177/0309132514548303(2014)

intersection between forced migration and forced labour in UK immigration systems. In section three, this intersection is elaborated through exploration of four salient processes through which (compromised) socio-legal status operates to facilitate entry into or continuation in forced labour: destitution, employers' instrumental use of compromised rights as a tool of coercion, the precarity track for refugees, and the legacy of illegality. A fourth section expands this focus to suggest that socio-legal status is one of a number of overlapping insecurities which compound to produce situations of hyper-precariety alongside processes of neoliberal, deregulated labour markets and migrants' trajectories, social position and familial pressures. In this article we want to consider the consequences of viewing forced labour through the lens of hyper-precariety for efforts to tackle severe labour exploitation. Universal labour rights are identified as a focal solution, diverging from the current dominant approach to criminalisation in anti-trafficking efforts.

Precarious Lives Research

This article draws on research data from our Precarious Lives project carried out between 2010–12. Fieldwork was conducted in the Yorkshire and Humber region of the UK, underpinned by participant observation outreach with 400 contacts and interviews with twenty-three policymakers and practitioners working at local, regional and national levels in migrant or refugee support and advice, anti-trafficking, labour regulation and advocacy. We interviewed thirty individuals with experience of one of six International Labour Organization (ILO) indicators of forced labour (see Table 1) and a claim for asylum in the UK, comprising twelve women and eighteen men, aged between 21 and 58 years who came from seventeen countries in Africa, the Middle East, Central Europe and South and Central Asia. Interviews typically lasted between two and three hours and involved biographical accounts of migrating to the UK, entering the asylum system and experiences of work guided by semi-structured prompts. Research participants had the study explained on at least one occasion prior to interview, were given time to ask questions, and the approach to anonymity—use of pseudonyms, separating narratives from participant data on nationality and other identifying factors in research outputs—was discussed. Throughout the article, interviewees are referred to by a pseudonym of their choice.

We analysed the 107 labour situations our thirty interviewees told us about against an expanded list of eleven ILO indicators of forced labour (see Table 1), indecent work and unfreedom. Of 107 labour situations, seventy-eight featured one or more ILO forced labour indicators, fifty-nine had two or more, and twenty-six had at least four indicators. The most prevalent were abuse of vulnerability, withholding of wages, deception, excessive overtime, abusive working and living conditions and the threat of denunciation or other intimidation. These jobs were in employment sectors that reflect the wider picture from research and advocacy on forced labour in the UK. Three quarters of these labouring situations were in just six types of employment: making or serving fast food, domestic work, factory packing, care work, cleaning and food processing.

Table 1: ILO indicators of forced labour

ILO 6 indicators	ILO 11 indicators
Threats of actual physical or sexual violence	Physical and sexual violence
Restriction of movement of the worker or confinement to a very limited area	Restriction of movement
Debt bondage, where the worker works to pay off debt	Debt bondage
Withholding wages or refusing to pay the worker	Withholding of wages
Retention of passports and identity documents	Retention of identity documents
Threat of denunciation to the authorities	Intimidation and threats
	Isolation
	Abuse of vulnerability, when an employer takes advantage of a workers' vulnerable position
	Abusive working and living condition
	Excessive overtime, obligation to work hours beyond national legal limits
	Deception, failure to deliver what has been promised to the worker

Socio-Legal Status, Asylum, and Forced Labour

We sought to include three principle groups at different stages of the asylum system: asylum seekers (people who have made a claim for asylum and are awaiting a decision), refused asylum seekers (whose claim for asylum has been refused) and refugees (referring to people who have received leave to remain⁸ after claiming asylum). We quickly found that

⁸ Leave to remain in the UK includes a range of statuses. Four principle groups are: 'Refugee Status' granted for five years; 'Humanitarian Protection' offering limited leave to remain, often for less than five years; 'Discretionary Leave', also for a limited period; and 'Case Resolution Indefinite Leave to Remain', indefinite leave granted to those

these initial three groups did not reflect the complexity of migrant journeys at the intersection of forced migration and forced labour in UK immigration systems. The fieldwork and interviews revealed three different groups with a claim for asylum and experiences of forced labour based on migration into the UK and how this shaped entry into the labour market (sketched in the typology in Table 2): asylum seekers at entry, irregular migrants and trafficked migrants.

Table 2: Typology of the intersection of forced migration and forced labour

	Migration entry route	Factors affecting asylum process and labour market entry
Asylum seekers at entry	Individuals make an asylum claim at or soon after entry to the UK	Asylum applicants are moved through compulsory dispersal to cities/towns around the UK and supported with limited asylum support (50–70% of mainstream benefits) and housing. They are unlikely to enter work <i>during</i> their claim, though some do. Most enter work <i>after</i> their asylum claim. Asylum support is removed within twenty-one days if the claim is refused, or twenty-eight days if granted refugee status.
Irregular migrants	The majority of irregular migrants enter on a valid visa in a range of categories and overstay. Some enter clandestinely.	Likely to enter work <i>before</i> claiming asylum. They may later make a claim for asylum if they were originally escaping from persecution or the situation in their country changes and they face risks if returned.
Trafficked migrants⁹	Brought to the UK for the purposes of sexual, criminal or forced labour exploitation. Entry may be through a variety of routes and documents controlled by the trafficker/agent before, during or after arrival.	Past experiences of exploitation in country of origin or transit countries may lead to, and continue in, entry into forced labour in the UK. Poverty in country of origin may contribute to decisions to accept risky migration strategies. ¹⁰ Trafficked migrants from outside the European Union (EU) may be offered the chance to claim asylum <i>after</i> exiting forced labour.

Of our thirty participants, seventeen (four female; thirteen male) were *asylum seekers on entry*, fourteen of whom first entered the labour market after their asylum claim was refused, their support removed and they were left without rights to work or welfare. Seeking a livelihood in the informal economy can become a necessity for *refused asylum seekers* left destitute if charitable provision from faith organisations, NGOs or social

applicants who applied before 2007 and were part of an exercise to resolve a ‘legacy’ of cases. All of these groups are theoretically able to access work and claim benefits as per UK citizens, but only those with ‘Refugee Status’ are eligible for support with travel and documents for Family Reunification.

⁹ 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, Article 3.

¹⁰ B Andrees, ‘Forced Labour and Trafficking in Europe: How people are trapped in, live through and come out,’ International Labour Office, 2008.

networks is exhausted.¹¹ One first entered work only after being granted refugee status, and two worked while their claim was being processed. *Asylum seekers* without the right to work in the UK are unlikely to enter the paid labour market due to fears of jeopardising their asylum claim if found in unauthorised work. *Refugees* can theoretically access mainstream benefits and find work, but face bureaucratic delays and experience high unemployment levels and considerable barriers to decent employment, pushing many into low-paid, low-skilled and/or informal labour.¹² The work trajectories of all those who entered work to survive as destitute refused asylum seekers or irregular migrants typically involved movement between multiple short-term jobs, some of which featured forced labour practices.

Seven interviewees (three female; four male) were *irregular migrants* who entered or remained without permission from the state. Most irregular migrants do not have rights to residence, work or welfare. Three with visas offering work rights initially accessed 'decent work', sometimes highly skilled and well paid. All but one entered legally on visitor, spouse, student or work visas and overstayed, entering exploitative usually informal labour after their work and residence rights expired and before later claiming asylum to regularise their stay and due to fear of persecution if returned to their country of origin. One entered on false papers and remained undocumented for a number of years. Five experienced a respite from exploitative work while in receipt of support during their asylum claim, only to again face destitution and pressures to enter (exploitative) work when their claims were refused.

Finally, six interviewees (five female; one male) entered the UK as *trafficked migrants* whose travel to the UK was facilitated by individuals who used threat or deception to move them into situations of domestic servitude, labour or sexual exploitation or criminal activities. Two escaped relatively quickly some weeks after being brought to the UK, but four were in a

¹¹ H Lewis, 'Destitution in Leeds: The experiences of people seeking asylum and supporting agencies', Joseph Rowntree Charitable Trust, 2007; J Burnett and D Whyte, 'The Wages of Fear: Risk, safety and undocumented work', Positive Action for Refugees and Asylum Seekers and the University of Liverpool, 2010.

¹² A Bloch, 'Refugees in the UK Labour Market: The conflict between economic integration and policy-led labour market restriction', *Journal of Social Policy*, 37, 2008; Community Links and Refugee Council, 'Understanding the informal economic activity of refugees in London,' Community Links and Refugee Council, 2011.

single, protracted forced labour situations for 1.5 to 9 years. Four of the females had been in forced labour situations prior to entering the UK. Trafficked individuals from outside the EU enter the asylum system if they make a claim for asylum simultaneously when applying for recognition under the National Referral Mechanism (NRM) for suspected victims of trafficking. As there is virtually no other legal way for a national from a less developed country (from outside the EU) to regularise their status, making a claim for asylum can offer valuable time and basic support. If recognised as a victim of trafficking under the NRM, up to one year leave to remain may be granted; while successful recognition as a refugee offers five years' limited leave to remain. However, it is likely that applicants with trafficking-based claims have very low success rates in the asylum system.¹³

Further overlap exists between trafficking and forced migration or asylum claims. 'Galant' was trafficked through the asylum system, and directed by his trafficker to make a claim for asylum as a means of entry into the UK. A minor who believed he was seeking a safer and better future in Europe, Galant spent only a few months being supported as an unaccompanied asylum-seeking child before the man who arranged his long overland journey forced him into criminal activities.

I met this guy, he had a nice car...He gave me a lot of money...It was a trick. I don't know when I realised. But now I know that I was trafficked for money, for illegal jobs, to make money for him.

'Abigail' was 14 years old when her mother, believing she was protecting her daughter from persecution due to her ethnicity, arranged a passport and travel to work as a domestic servant in an Arab state. There she worked twenty hours a day, was subjected to violent abuse, and was not paid. The family later brought her to the UK where she escaped and claimed asylum.

'Lydia', a refugee escaping imprisonment and torture, was assisted by a relative in the UK to escape. On arrival, the relative arranged work for

¹³ Discussed further in A Stepnitz, 'A Lie More Disastrous than the Truth: Asylum and the identification of trafficked women in the UK', *Anti-Trafficking Review*, issue 1, 2012. There is a lack of available data. The Home Office claims NRM and asylum processes are managed in separate databases.

her, retained her wages and regularly threatened her with denunciation to authorities and deportation to a country where he knew she faced risk of torture. Her urgent need to leave her country of origin was used by her relative to deceive her into forced labour in the UK, and the concrete threat of persecution used to as a tool of coercion. In these cases, we found a very direct link between trafficking, asylum and forced labour.

Considering the typology outlined in Table 2, the first point to emphasise is that people in the asylum system can be susceptible to forced labour. It is important to see the typology not as fixed, but as moments within fluid immigration trajectories that change over time resulting in shifts in concomitant rights and entitlements; and therefore affecting possibilities for protection, exit from forced labour or for securing a sustainable livelihood. Some of our participants, particularly those trafficked, had at different times occupied all three categories: trafficked, irregular and asylum seeker.

Socio-Legal Status and Susceptibility to Forced Labour

The typology begins to tease out the complex relationships between human trafficking, forced labour, labour rights and asylum systems. But simply stating that migrants are susceptible to forced labour does not reveal why some migrants are more at risk at certain times, and leaves unexamined the question of how immigration controls contribute to an environment where forced labour can flourish.¹⁴ To unpick some of these complex and multifaceted intersections, we identified in the narratives of our interviewees four salient ways in which socio-legal status contributes to susceptibility to forced labour: the intentional production of *destitution*; the *instrumental use* of compromised socio-legal status by employers; the *precarity track* refugees can struggle to get out of; and the legacy of *illegality*.

Destitution, resulting from lacking the right to work or access to any government support or benefits, was the primary driver into exploitative

¹⁴ P Dwyer, H Lewis, L Scullion and L Waite, 'Forced Labour and UK Immigration Policy: Status matters?', Joseph Rowntree Foundation, 2011; L Scullion, H Lewis, P Dwyer, L Waite, 'Exploring the Link Between Forced Labor and Immigration Status in the United Kingdom' in K K Hoang and R Salazar Parreñas (eds.), *Human Trafficking Reconsidered*, The International Debate Association London, 2014.

work for irregular migrants and refused asylum seekers in our study. They entered the paid labour market seeking cash for survival, to contribute to the households supporting them, and to raise funds for legal fees to regularise their immigration status. For refused asylum seekers, loss of asylum support and housing triggered homelessness and the urgent need to meet basic needs. ‘Pascual’, a child soldier, who entered the UK as a minor, was treated as an adult and had his asylum claim refused. Unable to speak English and with no information about possible sources of support, he slept rough in a train station where he encountered some people who spoke his language and helped him find a room and told him where early morning pick-ups for informal work were made. He spent the next seven months travelling an hour each way in a minibus to work slaughtering poultry in freezing conditions over 18-hour shifts with just one 15-minute break, seven days a week for GBP 80 (USD 185) a week (or 63 pence/98 US cents an hour):

Why? Because I need to pay the rent first thing, second I needed to buy food for me. The third, I need to live, to be alive. If I don’t do that, I cannot eat and I cannot drink, there is no one who can help me for that situation I was [in]. So indeed I have to force the body to do it. I remember one woman died. One woman died on the bus, because she was very tired.

With very limited social contacts, needing to find work without requisite authorisation and papers often means entering the labour market at the lowest point with no power to negotiate exploitative terms of employment. ‘Mohamed’ entered work in catering where he was paid half of that received by workers with ‘papers’, was shouted at and abused, and in one place told to conduct demeaning tasks such as washing the car of the manager and collecting meat from a far-away wholesaler on foot. However, he did this to get away from dangers he encountered when street homeless, including pressure to sell drugs:

When I get homeless, when my support finished I was looking for a job. I went to [city]. Not [applying] on any website; just to knock on the door to ask the manager do you need any work here? I’m looking for a job.

Particularly relevant here is the notion of having ‘no real or acceptable alternative’ to exploitation, a context recognised more in approaches to

trafficking than forced labour.¹⁵ As mentioned above, jobs accessed by irregular migrants and refused asylum seekers without permission to work were typically short term, irregular and very low paid, existing in areas of the labour market where precarious work breaching maximum working hours and minimum pay is a normalised reality.

Within these already low-paid and exploitative labour-scapes, our interviewees encountered examples of treatment that pointed to the deliberate, instrumental and systematic use by employers of workers within secure socio-legal status to impose forced labour practices on irregular migrants and refused asylum seekers. The use of threats of denunciation to immigration authorities and intimidation—reminding workers of their expendability and heavy dependence on any kind of work—was a predominant tool of coercion used to discipline workers. These threats were frequently invoked by employers precisely at the moment where worsening conditions were imposed that pushed labour situations towards forced labour. Such threats often emerged in the narratives of our interviewees when they described pushing back and challenging the imposition of excessive working hours, withheld pay or other abusive working conditions. Those working without authorisation were acutely aware of their employers' impunity because the 'doctrine of illegality' creates both substantive legal barriers to workers securing any rights, and creates understandable reluctance among workers to challenge bad treatment due to the risks of exposure and likely imprisonment and deportation.

'Shahid' worked an initial two-week period in a shop unpaid, and was then offered a fraction of the wages initially promised:

He knows very well [my refused asylum seeker status]. That's why people are in a position to exploit... this is where the fear is.... If I go to the police and say that I work for him and he do not pay me that money, will it be helpful for me? Will I get any protection?... No.

A set of generalised fears generated by insecure immigration status and associated constrained or non-existent rights to residence, welfare and

¹⁵ J O'Neill, 'Varieties of unfreedom', Manchester Papers in Political Economy, 2011.

work can thus operate both directly, in the case of employers making direct threats to denounce workers to immigration authorities, but also indirectly to discipline workers by closing down their ability or willingness to exit or seek help. The ever-present threat of destitution and homelessness forms a backdrop to labour relations that combine with fear of deportation and feelings of illegality, closing down possibilities for workers to challenge or exit from exploitative working conditions. For those working in the domestic sphere, acute isolation added to the sense of lack of any real or acceptable alternative leading to protracted situations of forced labour, as described here by ‘Ivy’, who was trafficked to the UK for domestic servitude:

First of all I don’t know anywhere to go, and secondly I don’t know anybody so only this man and his wife. I was looking after the children for them; I would clean the house. But every day they would tell me that they are looking for the school for me and so be patient. Me, I was believe them because I don’t know that they are lying to me you know. So up to three years.

For irregular migrants and refused asylum seekers without permission to work, the powerlessness associated with the fear of destitution or deportation was central to workers’ engagement in and employers’ imposition of situations of forced labour. While being granted leave to remain removes immediate fears of deportation, we found that barriers to accessing decent work and welfare nevertheless continued to structure refugees’ entry to the workplace. Some interviewees endured work featuring forced labour practices even after gaining status, expressing that their weak labour market entry point resulted from language barriers, non-recognition of qualifications, not being able to explain long gaps in their *curriculum vitae* while banned from working during the lengthy asylum process, and being pressured into low-paid, low-skilled work by welfare-to-work schemes. A significant additional factor were familial expectations to remit money to relatives or raise funds to cover legal, travel and visa costs of family reunification, coupled with government requirements to demonstrate income levels, resources and housing sufficient to support joining family members. Hence, the intersection of socio-legal status and forced labour cannot be understood as a simply a product of irregularity. Periods of precarious status have a lasting and negative effect creating a

‘precarity track’¹⁶ that can be difficult for refugees to shift out of, while ongoing bureaucratic and financial barriers to family reunification create intense pressure to remain in work regardless of the conditions. It is for these reasons that we would include refugees, who theoretically have similar rights to citizens, in our consideration of ‘hyper-precarity’, discussed below. Their history of insecure status and worklessness while claiming asylum, barriers to decent employment and position as refugees, usually unable to return to their country of origin or facing the risk of removal when their five-year refugee status expires, is qualitatively different from that of citizens.

A further lasting effect of precarious socio-legal status are the effects of criminalisation if found using false documents or in unauthorised work. Fears of the effects on any pending appeal or new asylum claim, and the substantial cost involved, meant that the decision to use constructed or borrowed documents was seen as a last resort when all other avenues to accessing work were exhausted. A sharp moral distinction was drawn by several interviewees between unauthorised work for survival and the use of false papers or identities, highlighting the multifaceted nature of ‘illegality’. However, faced with the treatment handed out to those who did not have permission to work, a small number of interviewees did decide to acquire false papers to access employment. Three interviewees faced the dire consequences of using false papers. Their subsequent criminalisation had long-term negative impacts on their ability to find and secure decent work, even after they had gained leave to remain. Current policy can be seen as encouraging the criminalisation of asylum seekers and stimulating an environment in which false papers, fake identities and shared documents are used to access paid work for survival in the absence of adequate welfare provision or the right to work.

Hyper-Precarity

For certain migrants in the UK who enter the asylum system through different routes, their compromised rights to residency, welfare and work within a complex hierarchy of socio-legal status structures their entry into, continuation in or preclusion of exit from situations of forced

¹⁶ L. Goldring and P. Landolt, ‘Caught in the Work–Citizenship Matrix: The lasting effects of precarious legal status on work for Toronto immigrants,’ *Globalizations*, vol. 8, issue 3, 2011.

labour. The labour situations subsequently encountered by our interviewees can be situated within a continuum of exploitation.¹⁷ Emphasising a continuum indicates how different exploitative labour situations may be judged to be at various points in a spectrum towards forced labour, but also emphasises how forced labour must be understood as a process. The deterioration of working conditions that may have started off as decent, through the abuse of vulnerabilities associated with immigration status, were discernable in the majority of our interviewees' accounts, as discussed above. Furthermore, the experiences of our thirty interviewees point to a broader environment of precarity and workplace abuses that makes movement along a continuum of exploitation to forced labour more likely. When coupled with ever-restrictive welfare and immigration regimes, the combination of precarious work and compromised immigration status creates an environment that favours unscrupulous employers and allows workplace abuses to flourish.

Placing severe labour exploitation within the continuum of exploitation highlights how it is connected to wider precarisation of work in the neoliberal labour market through the deregulation and the erosion of workers' rights. This relates to long-standing conceptual debates¹⁸ on the question of whether unfree labour is an anomaly alongside or integral to the operation of (neoliberal) capitalism.¹⁹ This approach distances from the construction of forced labour as an exceptional event at the hands of criminal or transgressive individuals. Rather, we argue, certain migrants at particular times experience a compounding of multidimensional precarity²⁰ that results in entry into the labour market at the lowest point while under considerable livelihood pressures. Alongside weak positioning in a neoliberal labour market, and the corrosive effects of compromised socio-legal status, the narratives of our interviewees pointed to a third significant dimension that shaped their decisions to enter or remain in severely exploitative work: their wider migration trajectories or 'migrant

¹⁷ K Skrivankova, 'Between Decent Work and Forced Labour: Examining the continuum of exploitation', Joseph Rowntree Foundation, 2010.

¹⁸ T Brass, 'Debating Capitalist Dynamics and Unfree Labour: A missing link?', *The Journal of Development Studies*, vol. 50, issue 4, 2014.

¹⁹ F Corrigan, 'Feudal Relics or Capitalist Monuments? Notes on the sociology of unfree labour,' *Sociology*, vol. 11, no. 3, 1977; R Miles, *Capitalism and Unfree Labour: Anomaly or necessity?*, Tavistock Publications, London and New York, 1987.

²⁰ S McGrath, 'Many Chains to Break: The multi-dimensional concept of slave labour in Brazil', *Antipode*, vol. 45, issue 4, 2013.

project', encompassing familial obligations, gendered social position, social expectations and pressures to remit money to family. Pressure to send money to support family was a significant factor for the few participants who had worked while in receipt of asylum support and awaiting the outcome of their asylum claim, for example. This compounding of compromised socio-legal status, adverse incorporation²¹ in the neoliberal labour market along with unequal social position, gender dimensions and indebtedness and/or social and familial obligations differentiates exploited migrants from a wider population of workers argued to be part of a global precariat.²² We therefore suggest that the lives of those migrants at the nexus of the ongoing interplay of neoliberal labour markets and highly restrictive immigration regimes can be better conceptualised as 'hyper-precarius'.²³ Hyper-precariety can offer a way to understand not only how forced labour is produced and facilitated, but also points towards a different set of solutions and actions to tackle forced labour.

Tackling Forced Labour

Viewing forced labour as part of, and a product of, wider, normalised precarious work practices and experiences has significant consequences for how we understand and respond to the task of tackling forced labour. This points to a significant dimension of migrants' forced labour experiences which are often overlooked in human-trafficking-focused responses that prioritise tackling the extreme practices perpetrated by particularly errant or malicious employers. Forced labour can form part of livelihood strategies for individuals experiencing multidimensional precarity when they face multiple, overlapping insecurities that result from the interplay of compromised socio-legal status, weak labour market position and migration trajectories.

We found that exit from more extreme forms of exploitation in forced labour, in many cases, amounted only to movement away from one instance of severe exploitation into other precarious livelihoods within a continuum of unfreedom. Unless one or more persistent insecurity is altered or resolved, racialised and gendered migration, work and welfare regimes and neoliberalism combine to create an ongoing 'precariety trap'

²¹ N Phillips, 'Unfree Labour and Adverse Incorporation in the Global Economy: Comparative perspectives on Brazil and India,' *Economy and Society*, vol. 42, issue 2, 2013.

²² G Standing, *The Precariat: The new dangerous class*, Bloomsbury Academic, London, 2011.

²³ Lewis et al., 'Hyper-precarius Lives?'

for migrant forced labourers.²⁴ For these reasons, a singular focus on ‘rescue’ from any one particular forced labour situation is unlikely to offer a durable solution unless other insecurities contributing to the ‘precarity trap’ are addressed. This requires a rethinking of the focus on detection and interception of individual situations of forced labour as a singular response to the putative growth of human trafficking and forced labour. The approach contained in the much-heralded UK Modern Slavery Act 2015 appears to continue in the vein of many current anti-trafficking programmes by focusing on the criminalisation of workers, employers and smugglers, and on the ‘rescue’ of ‘victims’. Alternative analyses that emphasise the importance of the creation of durable livelihoods to secure better outcomes for forced labourers and the role of immigration controls in facilitating forced labour are invisible in such approaches. Further, the financial and moral investment in criminalisation and ‘rescue’ infers the prioritisation of tackling forced labour and trafficking while closing down both practical access to resources and space for discussion of neoliberal capital and restrictive migration regimes as causes.

Underpinning our study of forced labour among refugees and asylum seekers with the concept of precarity meant that we asked about participants’ awareness of others in similar situations and examples of any mobilisation against exploitation. Participants largely did not know their experience as one of ‘forced labour’, which is not surprising for two reasons: first, forced labour is a relatively new term in support and enforcement; and secondly, we interviewed people with a wide range of experiences that ranged across spectrums of force, coercion, deception and confinement. The exceptions were four who had been supported into applying for protection as victims of trafficking, and one who had pursued a human rights prosecution. The use of colloquially phrased ILO forced labour indicators (Table 1) to describe practices rather than relying on understandings of coercion was therefore vital to uncovering experiences that neither migrants, refugees or asylum seekers, nor volunteers and practitioners in support agencies would name as ‘forced labour.’²⁵ Workers who experience forced labour practices may or may

²⁴ H Lewis, P Dwyer, S Hodkinson, L Waite, *Precarious Lives: Forced labour, exploitation and asylum*, Policy Press at the University of Bristol, Bristol, 2014.

²⁵ Discussed further in H Lewis, ‘Researching Experiences of Forced Labour Among Refugees and Asylum Seekers in the UK: Methodological and ethical issues’ in R de Wildt and D Siegel (eds.), *Ethical Concerns in Human Trafficking Research*, Springer, New York, 2015 (forthcoming).

not view their experience as coercive, and use of the forced labour label in research and responses to severe labour exploitation raises many questions about how involuntariness in relation to migrant agency is understood and constructed. To access support and protection as a ‘deserving victim’, a ‘trafficking narrative’ is required involving the appropriation or co-option of the migrant project—to earn money abroad—for the benefit someone else,²⁶ while the role of states in producing multi-dimensional insecurities at the nexus of precarious immigration and employment is side-lined. Aside from any conceptual arguments about the difficulties of identifying force and coercion in the field, which inevitably exist within continuums of exploitation and unfreedom, these pragmatic concerns about how people themselves experience severe labour exploitation should be central to efforts to tackle forced labour. We share with critical, feminist anti-trafficking scholars a concern that agency in migration and labour processes must be considered and exposed²⁷ to move away from the characterisation of ‘victims’ in order to recognise the complex social positions of people in or exiting from forced labour and how they will play a central role in movements to tackle contemporary exploitation.²⁸

The perspective of precarity, by linking severe forms of exploitation to more widespread abuses, offers the potential to link actions to tackle forced labour with the broader struggle for (migrant) workers’ rights. This would involve broad-based action across unions, faith networks, and the statutory and third sector to engage in community-based labour organising and widespread basic rights information campaigns for migrant workers. This must be coupled with political campaigns to challenge root causes: restrictive immigration policies that routinely limit or remove migrants’ rights while focusing enforcement efforts on individual immigrants rather than exploitative workplaces. The recognition and inclusion of migrants as transnational actors and activists must be central to this work. Understanding that forced labour exists within and moves

²⁶ S Plambech, ‘Between “Victims” and “Criminals”’: Rescue, deportation, and everyday violence among Nigerian migrants’, *Social Politics*, 2014.

²⁷ L Waite et al., ‘Precarious Lives: Refugees and asylum seekers’ resistance within unfree labouring’, ACME, 2015 (forthcoming).

²⁸ See for example: R Andrijasevic, *Migration, Agency and Citizenship in Sex Trafficking*, Palgrave Macmillan, Basingstoke, 2010; D Brennan, *Life Interrupted: Trafficking into forced labor in the United States*, Duke University Press, Durham, 2014.

along a continuum of exploitation demonstrates that *all* efforts to tackle precarious working conditions to secure decent work matter when trying to prevent severe exploitation.

Conclusion

Current UK asylum policy contributes to rendering asylum seekers susceptible to forced labour by systematically denying basic rights, especially the right to work, and by offering poverty-level support within the asylum system, or through operating an intentional policy of destitution for those refused asylum. This creates a legacy that generates an ongoing precarity track for refugees who continue to be at risk of entering severely exploitative work. Alternatively, for irregular migrants and trafficked persons, the asylum system potentially can offer, at least initially, a form of protection and way out of forced labour. However, this possibility for protection needs to be mediated by recognition that asylum support may only constitute a respite from the necessity to engage in severely exploitative work if an individual's claim is refused and they are left destitute. The role of immigration regimes in facilitating forced labour extends back into pre-migration contexts. The arrangement of risky and urgent migration strategies common in situations of forced migration to escape persecution can lead directly or indirectly to subsequent exploitation in forced labour. This inculcates the 'externalisation' of the EU's border enforcement to neighbouring countries; militarised border patrols on land and sea; quota driven-deportations; and greater use of detention in the production of trafficking and forced labour by closing down safe routes for movement.

A migrants' rights approach needs to be integral if the struggle to tackle forced labour is to be successful in addressing systematic forms of severe exploitation of migrants in general, and particularly of those intentionally weakened by removal of their rights to legally support themselves with work or welfare. The perspective of precarity could allow scholars, activists, practitioners, and, we hope, governments and state actors not only to understand and explain the existence of forced labour in the heart of advanced economies of the global north, but also to combat forced labour with a new direction and set of tools.

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'Tied Visas' and Inadequate Labour Protections: A formula for abuse and exploitation of migrant domestic workers in the United Kingdom

Daphne Demetriou

Abstract

This article examines the link between restrictive immigration schemes, specifically 'tied visas' and the selective application of labour laws, with exploitation of workers. It focuses on the situation of migrant domestic workers, who accompany their employers to the United Kingdom (UK) and are exposed to both an excessively restrictive visa regime, introduced in April 2012, and limited labour protections. The immigration status of these workers is currently tied to a named employer, a restriction that traps workers into exploitative conditions, often amounting to forced labour, servitude or slavery. Additionally, current UK labour laws are either not enforced or not applicable to domestic workers. The article concludes that unless the current immigration regime is abolished and comprehensive labour law protections are extended to migrant domestic workers, exploitation will continue.

Keywords: domestic workers, immigration law, *Kafala*, labour law, exploitation

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Introduction

The abuse and exploitation endured by many migrant domestic workers globally is well documented and can often reach levels of forced labour, servitude or slavery.¹ This article does not attempt to map all instances and forms of exploitation; its aim is to examine how immigration and labour regimes contribute to such abuse. Reports concentrating on the UK and various Arab States, which are the focus of this article, include migrant domestic workers' accounts of physical, sexual and psychological abuse.² Many have had their passports confiscated and are prevented from leaving the place of employment unaccompanied.³ Domestic workers report working excessive hours often for minimal, if any, salary.⁴ Such conditions put the physical health and safety of workers at great risk, emphasising the need for protecting their rights.

This article does not claim that in the absence of restrictive immigration and labour regimes migrant domestic workers are not at risk of exploitation. Indeed, a number of intrinsic characteristics of domestic work enable exploitation to flourish. Nevertheless, what makes the situation in the UK particularly severe is that the present immigration and labour regimes applicable to migrant domestic workers facilitate and enhance such abuse, elevating it from individual abuse on the part of the employers to institutionalised exploitation.⁵

¹ Organization for Security and Co-ordination in Europe (OSCE) Office of the Special Representative and Coordinator for Combating Trafficking in Human Beings, 'Unprotected Work, Invisible Exploitation: Trafficking for the purpose of domestic servitude', OSCE, 2010; P Smales, 'The New Slave in the Kitchen: Debt bondage and women migrant domestic workers in Asia', Asia Pacific Forum on Women, Law and Development, 2011.

² R Begum, "'I Already Bought You': Abuse and exploitation of female migrant domestic workers in the United Arab Emirates", Human Rights Watch (HRW), 2014, pp. 32–33; Kalayaan, 'Still Enslaved: The migrant domestic workers who are trapped by the immigration rules', Kalayaan, 2014, retrieved 5 January 2015, <http://www.kalayaan.org.uk/wp-content/uploads/2014/09/tied-visa-20141.pdf> ; HRW, "'As If I Am Not Human" Abuses against Asian domestic workers in Saudi Arabia', HRW, 2008, p. 69.

³ V Mantouvalou, 'Overseas Domestic Workers: Britain's domestic slaves', *Socialist Lawyer*, no. 69, 2015, p. 44.

⁴ I Leghtas, 'Hidden Away: Abuses against migrant domestic workers in the UK', HRW, 2014, pp. 33–35; Begum, pp. 36–38; Kalayaan, 'Britain's Forgotten Slaves; Migrant domestic workers in the UK three years after the introduction of the tied Overseas Domestic Worker visa', Kalayaan, 2015, retrieved 26 June 2015, <http://www.kalayaan.org.uk/wp-content/uploads/2014/09/Kalayaan-3-year-briefing.pdf>

⁵ House of Lords/House of Commons, 'Report of the Joint Committee on the Draft Modern Slavery Bill' (Session 2013-14, HL Paper 166, HC 1019), para. 225.

When examining restrictive immigration regimes, the article looks at the *Kafala* system, which has received great censure, and compares it to the current UK migrant domestic worker visa. Relevant UK immigration rules are examined, together with parliamentary and non-governmental organization (NGO) reports on the current visa and its effects. A number of core UK labour law provisions are reviewed in an attempt to demonstrate how domestic workers are, implicitly or explicitly, excluded from key protections. Finally, the article seeks to identify means of enhancing the protection of migrant domestic workers' rights to freedom from abuse and exploitation.

Domestic Workers: Characteristics and vulnerabilities

According to the International Labour Organization (ILO), domestic work is 'work performed in or for a household or households'.⁶ The prominence of domestic work worldwide is evident by recent ILO estimates, surmising that between 1995–2010 the global number of domestic workers has risen from approximately 33.2 million to 52.6 million.⁷ Domestic work is a female-dominated sector, with women accounting for 83% of domestic workers worldwide.⁸ Even though an exact percentage cannot be obtained due to data limitations, a high percentage of female domestic workers are migrants.⁹ This supports the view that there has been a trend towards the 'feminisation of migration',¹⁰ with many women from less developed countries now moving to more developed countries in order to take employment as domestic workers. Recent research on the 'feminisation of migration' moves away from the initial focus on wives and children migrating to join earlier waves of male migrants, and looks at women as independent labour migrants.¹¹ As Beneria, Deere and Kabeer observe, 'profound transformations [have

⁶ ILO, *C189—Domestic Workers Convention, 2011 (No. 189), Convention concerning decent work for domestic workers*, 16 June 2011, Article 1 (Domestic Workers Convention).

⁷ ILO, 'Domestic Workers Across the World: Global and regional statistics and the extent of legal protections', International Labour Office, 2013, p. 24.

⁸ *Ibid.*, pp. 19, 21.

⁹ *Ibid.*, pp. 24, 39.

¹⁰ See N Piper, 'Feminisation of Migration and the Social Dimensions of Development: The Asian case', *Third World Quarterly*, vol. 29, issue 7, 2008; A Hochschild, 'Love and Gold' in B Ehrenreich and A Hochschild (eds.), *Global Woman: Nannies, maids and sex workers in the new economy*, Granta, 2003, p. 17

¹¹ E Hofmann and C Buckley, 'Global Changes and Gendered Responses: The feminization of migration from Georgia', *International Migration Review*, vol. 47, issue 3, 2013, p. 510.

been witnessed] in the structure of families and gender roles in the international division of labor';¹² with female migrants constituting 'a mighty but silent river' in the migration reality.¹³

Contrary to men however, migrant women enter a market that is often left in the informal economy with limited protections for the worker. Entrenched gender discrimination affects the social, economic and political rights of women in their home countries, limiting their educational and employment opportunities.¹⁴ As Satterthwaite notes, the feminisation of migration is driven by a number of 'worldwide forces in which gender roles and sex discrimination are intertwined with globalization'.¹⁵ Thus, while migrant men are given the opportunity to enter both low and high-skilled jobs, commonly part of the formal economy, women are often restricted to a finite range of female-dominated occupations, rooted within traditional gender perceptions often placing the woman in the home.

The article's focus on migrant domestic workers is based on the increased precariousness and vulnerability of their situation, due to restrictive immigration schemes. The use of the terms 'precariousness' and 'vulnerability' is intentional, as explained below, and both terms have academic precedent in research on migrant domestic workers.¹⁶

Elements identified as determining whether an employment relationship is a precarious one include the control the worker has over the labour process, for example over the working conditions and the wages; the degree of certainty as to the continuance of the employment; the

¹² I. Beneria, C. Deere and N. Kabeer, 'Gender and International Migration: Globalization, development and governance' in L. Oso and N. Ribas-Mateos (eds.), *The International Handbook on Gender, Migration and Transnationalism: Global development perspectives*, Edward Elgar Publishing Ltd, 2013, p. 45.

¹³ United Nations Population Fund (UNFPA), 'State of World Population 2006: A passage to hope—Women and international migration', UNFPA, 2006, p.21.

¹⁴ OSCE Office of the Special Representative and Coordinator for Combating Trafficking in Human Beings, 'Combating Trafficking as Modern-Day Slavery: A matter of non-discrimination and empowerment', OSCE, 2012, p. 51.

¹⁵ M. Satterthwaite, 'Using human rights law to empower migrant domestic workers in the inter-American system' in N. Piper (ed.), *New Perspectives on Gender and Migration: Livelihood, rights and entitlements*, Routledge, Oxon, 2008, p. 278.

¹⁶ V. Mantouvalou, 'Human Rights for Precarious Workers: The legislative precariousness of domestic labour', *Comparative Labor Law and Policy Journal*, vol. 34, issue 1, 2012, pp.133–166; J. Fudge and R. Owens, 'Precarious Work, Women and the New Economy: The challenge to legal norms' in J. Fudge and R. Owens (eds.), *Precarious Work, Women and the New Economy*, Hart Publishing, Oxford, 2006, p. 10.

regulatory protection available for the particular employment sector; and the income level of the employment.¹⁷ The majority of these elements are directly linked to state policies and laws, and as this article demonstrates the UK government has contributed to the creation and maintenance of such precarious employment relationships.

Vulnerable workers have been defined as individuals ‘who are at risk of having their workplace entitlements denied, and who lack the capacity or means to secure them.’¹⁸ Under this definition, it is clear that vulnerability can be both the result of precarious employment, due for example to the lack of labour law protections, and the result of characteristics of the particular individuals and labour sectors that may hinder their protection.

Anderson asserts that the term ‘precariousness’ is more suitable for describing the situation of domestic work and domestic workers than the term ‘vulnerability’ as the latter risks ‘naturalising these conditions and confining those workers so affected to victimhood.’¹⁹ Yet, by referring to domestic workers as ‘vulnerable’, the author does not claim that this is an inherent characteristic of the particular persons, but as Satterthwaite notes, vulnerability is ‘the product of political, economic, and cultural forces acting along a variety of identity axes, including gender, race, and nationality, that disempower specific sets of women in particular ways.’²⁰ ‘Precariousness’ does not fully capture the dangerous situation in which individuals often find themselves. Precarious employment can simply refer to non-standard work.²¹ Such flexible employment can often be the conscious choice of the worker and the most beneficial one in meeting his or her needs and obligations during a particular period. Notably, flexible and secure employment has been strongly advocated by the European Commission through its ‘Flexicure’ strategy.²² Accordingly,

¹⁷ G Rodgers, ‘Precarious Work in Western Europe: The state of the debate’ in G Rodgers and J Rodgers (eds.), *Precarious Jobs in Labour Market Regulation: The growth of atypical employment in Western Europe*, ILO, Geneva, 1989, p. 3.

¹⁸ Health and Safety Executive (HSE), ‘Vulnerable Workers’, HSE, retrieved 27 January 2015, <http://www.hse.gov.uk/vulnerable-workers/>

¹⁹ B Anderson, ‘Migration, Immigration Controls and the Fashioning of Precarious Workers’, *Work, Employment & Society*, vol. 24, no. 10, 2010, p. 303.

²⁰ M Satterthwaite, p. 286.

²¹ M Ori and M Sargeant, ‘Introduction’ in T Fashoyin and M Tiraboschi (eds.), *Vulnerable Workers and Precarious Working*, Cambridge Scholars Publishing, Newcastle-upon-Tyne, 2013.

²² European Commission (EC), ‘Employment, Social Affairs and Inclusion, “Flexicure”’, EC, retrieved 24 June 2015, <http://ec.europa.eu/social/main.jsp?catId=102&langId=en>

describing the situation of migrant domestic workers as merely precarious—a term commonly understood as flexible, non-standard work—runs the risk of trivialising such workers’ situation. It is vital for policy and legislative changes, but also for the mobilisation of civil society, to display the true picture of migrant domestic workers; that is of vulnerable workers in precarious employment.

Before examining how restrictive immigration regimes and inadequate labour protections generate or maintain the exploitation of migrant domestic workers, it is important to look at some inherent aspects of domestic work that can automatically place them in a vulnerable position. While the current UK immigration regime does not stipulate that domestic workers must live in the same dwelling as their employer, the majority of workers live-in,²³ as the alternative requires either the employer to pay for the worker’s accommodation, or the latter’s wage to be sufficient to cover this expense.²⁴ The private nature of domestic workers’ employment and living environment renders its regulation challenging. The workers’ isolation further limits their access to information and assistance.²⁵ The longstanding principle of the inviolability of the private home conflicts with state aims to regulate labour, confining domestic work to the shadows and allowing abuse to occur undetected. This is evidenced for example by the reluctance of states, including the UK, to apply to domestic work the same rules on labour inspection as applied to other labour sectors.²⁶ Importantly, the conflation of the workers’ workplace with the home can enhance the intimacy between the two parties and reinforce the view of a paternalistic or familial relationship.²⁷ This presumed ‘labour of love’²⁸ is often used to justify the worker undertaking more tasks and working longer hours in order to please the ‘considerate employer’.²⁹

²³ Kalayaan, ‘Britain’s Forgotten Slaves’.

²⁴ UK Visas and Immigration, ‘Guidance: Overseas domestic workers in private households: WRK2.1’, UK Visas and Immigration, retrieved 29 June 2015, <https://www.gov.uk/government/publications/overseas-domestic-workers-in-private-households-wrk21/overseas-domestic-workers-in-private-households-wrk21—2#wrk216-maintenance-and-accommodation>

²⁵ OSCE, ‘Unprotected Work, Invisible Exploitation’, p.15

²⁶ Thomson Reuters Foundation for the Trust Women Conference, ‘A Landscape Analysis of Domestic Workers’ Rights and ILO Convention 189’, Thomson Reuters Foundation, 2012.

²⁷ V Mantouvalou, ‘The Many Faces of Slavery: The example of domestic work’, *Global Dialogue*, vol. 14, no. 2, 2012, retrieved 1 February 2015, <http://www.worlddialogue.org/content.php?id=536>

²⁸ M Romero, *Maid in the U.S.A.*, Routledge, New York, 1992.

²⁹ ILO, ‘Report IV(1): Decent work for domestic workers’, International Labour Office, 2010, p.12.

One may argue that this highly personalised and dependent relationship between the employer and the domestic worker is unavoidable with live-in domestic work and therefore exposure to exploitation cannot be attributed to state-imposed policies and laws. Nevertheless, the very fact that this employment is already a precarious one makes regulation and labour protection imperative.

Migrant Domestic Workers under the *Kafala* system

Strikingly similar to the current UK immigration regime, the *Kafala* system is an immigration scheme for low-skilled migrant workers, including domestic workers, applied in a number of Gulf Cooperation Council (GCC) states, as well as in Jordan and Lebanon.³⁰ The term *Kafala* literally translates to 'surety, bail, guarantee, responsibility or amenability'.³¹ This portrayal of responsibility and guardianship is echoed in the usage of the term when applied to the regulation of the employer-low-skilled migrant worker relationship.

The way in which the *Kafala* system is implemented varies.³² While for example in the GCC countries all migrant workers are subject to the *Kafala* system, in Lebanon it is utilised for low-skilled workers coming primarily from Africa and Asia, but not for those from Syria.³³ Nonetheless, for the purposes of this article, the main element of this system, which is also present in the current UK visa system, can be identified throughout. Therefore this section does not focus on a particular form of *Kafala*, but rather on the negative effects of this all-encompassing immigration system.

In order for migrant workers to receive an entry visa under the *Kafala* system, a citizen or institution of that state must employ them and the

³⁰ Migrant Forum in Asia (MFA), 'Policy Brief No. 2: Reform of the Kafala (sponsorship) system', MFA, 2012, retrieved 22 July 2015, <http://www.mfasia.org/resources/publications/464-mfa-policy-briefs>

³¹ A Abikan, 'Contract of Kafalah (Guarantee): A veritable product of Islamic financing?' *University of Ilorin Law Journal*, 3 and 4, 2008, p. 200.

³² S Roper and L Barria, 'Understanding Variations in Gulf Migration and Labor Practices', *Middle East Law and Governance*, vol. 6, 2014.

³³ K Azfar and H Harroff-Tavel, 'Reforming the Kafala: Challenges and opportunities in moving forward', Paper presented at 'Strengthening Dialogue to Make Migration Work for Development in the ESCAP and ESCWA Regions', Beirut, 2011, p. 294.

worker can only work for that sponsor during her stay. The employer assumes full economic and legal responsibility for the worker.³⁴ Under Saudi Arabia's *Kafala* system for example, the employer 'bears the responsibility for the worker's recruitment fees, completion of medical exams, and possession of an *iqama*, or national identity card.'³⁵ The most controversial aspect of this scheme, found in all *Kafala*-supportive states, is the fact that the worker's residency permit is dependent on her continued employment by the named sponsor, a feature that 'ties' the employee to her employer. Therefore, in order for workers to change employment or leave the country, they must receive an 'exit visa' from their sponsor.³⁶

While the sponsorship arrangement is beneficial for the respective state, as it enables it 'to regulate labor flow...and monitor worker activities to mitigate security concerns',³⁷ this regime has proved extremely detrimental for migrant domestic workers. As the Special Rapporteur on the human rights of migrants noted, '[t]he *Kafala* system enables unscrupulous employers to exploit employees.'³⁸ This form of dependency is multifaceted, consisting of a legal, economical and livelihood dependency on the employer. The legal dependency alone greatly enhances an already vulnerable position as fear of arrest and deportation come into play and affect the worker's decision to flee and report an abusive situation. Accordingly, as the ILO Committee of Experts has noted, *Kafala* can be conducive to the exaction of forced labour.³⁹

A 2014 report on the relation of the *Kafala* system to labour bondage in GCC countries provides a glimpse of the effects this system can have on workers. Some of the common forms of abuse recorded in Gulf countries include:

³⁴ Roper and Barria, p. 34.

³⁵ HRW, 'As if I am Not Human', p. 26.

³⁶ Ibid.

³⁷ Roper and Barria, p. 34.

³⁸ Report of the Special Rapporteur on the human rights of migrants, F Cr peau, 'Addendum Mission to Qatar', para. 25.

³⁹ ILO, 'Giving Globalization a Human Face: General survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, Report III(1B)', International Labour Conference, 101st Session, Geneva, 2012, pp. 126–27.

[N]onpayment or underpayment of wages, confiscation of passports, inadequate living conditions, long working hours, agency fees and recruitment violations, contract substitution and restricted or no freedom of movement, physical, sexual or emotional abuse...⁴⁰

The control granted to employers over migrant workers under the *Kafala* system has been enhanced by the adoption of a number of additional laws. One such law is the crime of ‘absconding’. In Kuwait for example, as soon as the worker is reported missing, police can cancel her residency permit and register an order for her detention and deportation.⁴¹ In Saudi Arabia, it has been reported that an estimated 20,000 migrant domestic workers ‘abscond’ from their employers on an annual basis.⁴² As the workers’ legal status is tied to their employer, once they flee, they automatically become undocumented. The potential effects of such ‘absconding laws’ can result in many workers choosing to work under the radar, which can expose them to a greater risk of exploitation. As Naufal’s and Malit’s qualitative interviews reveal, due to their undocumented status, many domestic workers struggle to bargain for higher wages, and the absence of an employment contract leads to their labour rights being disregarded with impunity.⁴³

Promises have been made by many *Kafala*-supportive states to abolish this restrictive immigration regime, yet nominal action has been taken.⁴⁴ Notably, in 2009 Bahrain passed a new law seemingly abolishing this

⁴⁰ Asia Pacific Mission for Migrants, ‘The Kafala: Research on the impact and relation of the sponsorship system to migrant labor bondage in GCC countries’, APMM, 2014, p. 29.

⁴¹ HRW, ‘Walls at Every Turn: Abuse of migrant domestic workers through Kuwait’s sponsorship system’, HRW, 2010, p.8.

⁴² K Nikolas, ‘Saudi proposal to fine runaway workers’, *Digital Journal*, 2 March 2012, retrieved 2 February 2015, <http://www.digitaljournal.com/article/320532>

⁴³ F Malit and G Naufal, ‘Asymmetric Information under the Kafala Sponsorship System: Impacts on foreign domestic workers’ income and employment status in the GCC Countries’, Cornell University ILR School, Working Paper, 21 October 2014, p.17, retrieved 1 February 2015, <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1177&context=workingpapers>

⁴⁴ HRW, ‘Saudi Arabia: A step to aid migrant workers’, HRW, 10 April 2012, retrieved 2 February 2015, <http://www.hrw.org/news/2012/04/10/saudi-arabia-step-aid-migrant-workers>; Ministry of the Interior, ‘Qatar announces wide-ranging labour market reforms’, Ministry of the Interior, 2014, retrieved, 3 February 2015, <http://www.moi.gov.qa/site/english/news/2014/05/14/32204.html>

system, allowing migrant workers to change employers.⁴⁵ Nevertheless, a subsequent law introduced in 2011 undermined this reform, stipulating that the worker needs to remain with the same employer for a year before being legally allowed to change employers.⁴⁶

According to the international community, *Kafala* is a system that has failed time and again.⁴⁷ Not only domestic workers, but also many others entering states under this system, experience its negative impact. Recent criticism has focused on labour exploitation of migrant workers entering Qatar to work on 2022 World Cup projects.⁴⁸ Accordingly, one would reasonably assume, that a system that has been shown as unequivocally failing to uphold basic labour and human rights of migrant workers is a system to denounce, or at a minimum one to avoid. Nevertheless, while GCC states can be seen taking steps, at least on paper, towards the abolition of this system, the UK chose to ignore the condemnation of the international community and in April 2012 commenced tying migrant domestic workers to their employers.

Domestic Workers in a Private Household Visa: *Kafala* by a different name?

To appreciate fully the potential impact of the current UK immigration regime for migrant domestic workers it is important to examine the previous visa regime: the '1998 visa'.⁴⁹ In order for domestic workers to enter the UK under the 1998 visa they had to prove themselves as an established member of their employer's staff. They were given permission to stay for a fixed period of twelve months towards the end of which they either had to leave the country or apply for an extension. The extension would allow them to stay and work as domestic workers for another twelve months, at the end of which they could make another application

⁴⁵ Decision No. (79) for 2009 Regarding the mobility of foreign employee from one employer to another.

⁴⁶ Bahrain News Agency, 'HM King Hamad Issues Law 15/2011', Bahrain News Agency, retrieved 2 February 2015, <http://bna.bh/portal/en/news/461096>

⁴⁷ F Crépeau, 'Report of the Special Rapporteur on the human rights of migrants, Addendum Mission to Qatar', Office of the High Commissioner for Human Rights (OHCHR), 2014.

⁴⁸ P Pattison, 'Revealed: Qatar's World Cup "slaves"', *The Guardian*, 25 September 2013, retrieved 1 February 2015, <http://www.theguardian.com/world/2013/sep/25/revealed-qatars-world-cup-slaves>

⁴⁹ Immigration Rules, Part 5, HC 395 of 1993-4 as amended by CM 5597 of 22 August 2002.

for extension. After five years of continuous employment as domestic workers, they could apply for settlement. The most important aspect of this visa was that workers were allowed to change employers, at any point during their initial or extended twelve months, as long as they remained in employment as domestic workers.⁵⁰

The ability to change employers provided workers both with an exit option when experiencing exploitation, and with greater bargaining power against employers, who did not control their legal status, a power that gave unscrupulous employers a false sense of proprietorship over domestic workers. Nevertheless, this regime, which has been described as a best practice,⁵¹ is now merely a past glory as this visa was repealed in April 2012.

Under the new immigration rules, domestic workers, excluding those who had already been granted a visa under the former regime, can only enter the UK if accompanied by their overseas employer or the employer's spouse or child who is visiting the UK. Workers must now leave the UK when their employer leaves, and at a maximum six months after arrival. The new rules remove the possibility of applying for settlement. Most importantly, migrant domestic workers are no longer allowed to change employers.⁵²

The government asserted that such a change was necessary to bring immigration rules in line with the UK policy of reducing net migration and focusing on the 'brightest and best' migrants.⁵³ Yet, despite pledges to reduce net migration from the hundreds of thousands to the tens of thousands,⁵⁴ estimates of net migration for 2014 were at 318,000, a

⁵⁰ UK Border Agency (UKBA), 'Domestic Workers', retrieved 25 June 2015, <http://webarchive.nationalarchives.gov.uk/20140110181512/>; <http://www.ukba.homeoffice.gov.uk/workingintheuk/othercategories/domesticworkers/>

⁵¹ J A Bustamante, 'Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante—Addendum—Mission to the United Kingdom of Great Britain and Northern Ireland', OHCHR, 2010, para. 60.

⁵² M Gower, 'Immigration: Migrant domestic workers', House of Commons Library, Home Affairs Section, SN/HA/4786, 20 March 2012, p.7.

⁵³ Press Release, 'British Prime Minister David Cameron Delivers Major Speech on Immigration Policy', retrieved 28 June 2015, <https://www.gov.uk/government/news/british-prime-minister-david-cameron-delivers-major-speech-on-immigration-policy>

⁵⁴ Prime Minister David Cameron's Speech on Immigration, 10 October 2011, retrieved 26 June 2015, <https://www.gov.uk/government/speeches/prime-ministers-speech-on-immigration>

significant increase from the 209,000 in 2013.⁵⁵ These figures therefore rebut any attempt to justify this drastic and harmful visa change for domestic workers. The visa's sole detectable impact has been, as demonstrated in this article, the creation of a workforce highly vulnerable to exploitation.

In an attempt to quell the objections to the new visa, the government introduced 'safeguards' in the form of eligibility criteria. Specifically, for migrant domestic workers to enter the UK written evidence must be provided that they have worked for their employer for at least twelve months prior to their arrival. Furthermore, before arriving in the UK, a contract of employment setting out the terms and conditions agreed between the parties needs to be presented. Finally, Home Office officials have been tasked with disseminating information to all workers applying for this visa, delineating their rights in the UK.⁵⁶

Such measures could in theory contribute to the reduction of migrant domestic workers' vulnerability to exploitation; evidence indicates however, that the government is failing to implement these safeguards.⁵⁷ The requirement that a worker has worked for the employer for at least twelve months prior to arrival does not constitute a new safeguard, but was already an eligibility requirement under the 1998 visa.⁵⁸ In any event, this requirement is not a guarantee that the worker is not in an already abusive employment relationship. Indeed, according to Mantouvalou, who conducted interviews with migrant domestic workers who arrived in the UK under the tied visa, many reported that their working conditions prior to arrival were already very poor. The interviewees reported working between twelve and twenty hours a day, with no day off, and almost all reported not being allowed to leave the house unaccompanied. Notably, some reported physical, sexual and psychological abuse.⁵⁹ Such grave exploitation, often amounting to forced

⁵⁵ Office for National Statistics, 'Migration Statistics Quarterly Report, May 2015', retrieved 26 May 2015, <http://www.ons.gov.uk/ons/rel/migration1/migration-statistics-quarterly-report/may-2015/stb-msqr-may-2015.html>

⁵⁶ Home Office, 'Statement of Intent: Changes to Tier 1, Tier 2 and Tier 5 of the Points Based System; Overseas Domestic Workers; and Visitors', 2012.

⁵⁷ Written evidence submitted by Dr Virginia Mantouvalou on the Modern Slavery Bill, prepared 15 October 2014, retrieved 28 November 2014, <http://www.publications.parliament.uk/pa/cm201415/cmpublic/modernslavery/memo/ms28.htm>

⁵⁸ UKBA, 'Domestic Workers, Eligibility', retrieved 23 June 2015, <http://webarchive.nationalarchives.gov.uk/20140110181512/http://www.ukba.homeoffice.gov.uk/workingintheuk/othercategories/domesticworkers/eligibility/>

⁵⁹ V Mantouvalou, 'Overseas Domestic Workers: Britain's domestic slaves', p. 42.

labour, servitude or slavery, exacerbated by the fear of deportation, can and has been reported to result in physically and/or psychologically trapped individuals who will either endure the abuse or become undocumented, rather than going to the authorities.⁶⁰

Additionally, measures such as the delineation of contract terms and rights-awareness ought to be applied regardless of the workers' visa type. These constitute basic safeguards against exploitation and should be standard practice, rather than being presented as a proactive and innovative method conceived by the government for protecting these individuals. Importantly, there is no guarantee that the contracts presented are legitimate or that the terms delineated within them will be respected once the visa is granted. Domestic workers confirmed the non-implementation of contracts during interviews with Mantouvalou.⁶¹ As the next section demonstrates, the situation is further exacerbated with the exclusion of migrant domestic workers from numerous labour law protections.

There has been widespread criticism of this new visa. Kalayaan, a UK-based NGO working to provide advice and support to migrant domestic workers, insisted that such a regime would increase the instances of human trafficking.⁶² One of the arguments posited by the government in an attempt to placate such fears, is that the National Referral Mechanism (NRM) exists to identify and support victims of trafficking.⁶³ While such a mechanism is important, it does not constitute a prophylactic approach, but simply an *ex post facto* measure, confirming the very fact that this visa exposes individuals to exploitation. Furthermore, the current NRM is flawed, partly because the UK Visas and Immigration (UKVI), one of the bodies responsible for identifying trafficking victims, is also responsible for deporting undocumented migrants. It therefore follows that numerous workers registered with Kalayaan, whose situations display human trafficking characteristics, do not wish to be referred to the NRM.⁶⁴

⁶⁰ Ibid., p. 43.

⁶¹ Ibid., pp 42–43.

⁶² Kalayaan, 'Response on Consultation: Migrant domestic workers', p. 3, retrieved 23 October 2014, [http://www.kalayaan.org.uk/documents/Kalayaan%20full%20response%20to%20consultation%20\(final\).pdf](http://www.kalayaan.org.uk/documents/Kalayaan%20full%20response%20to%20consultation%20(final).pdf)

⁶³ Home Office, 'Impact Assessment Changes to Tier 5 of the Points Based System and Overseas Domestic Worker routes of entry', IAHO0053, 15 March 2012, p.17, retrieved 1 February 2015, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117958/impact-assessment.pdf

⁶⁴ Kalayaan, 'Still enslaved'.

The anticipated effects of the new visa regime have been and continue to be realised. In a May 2015 report, Kalayaan found that in the three years since the introduction of the tied visa, the level of abuse reported has been consistently higher than under the 1998 visa. In particular, domestic workers reported that 14% of those tied to their employers were physically abused, as opposed to 9% of those under the old visa; 66% of workers on the current visa reported being prevented from leaving the house freely, compared to 41% of workers previously; 81% of those on the tied visa reported having no time off compared to 66% of those under the 1998 visa; 31% of those on the current visa reported not being paid at all, compared to 11% under the old visa; and 74% of those on the tied visa had their passports withheld, compared to 50% under the 1998 visa.⁶⁵

A 2013 report on modern slavery also highlighted the negative effects of the current visa regime and the need for its abolition. It noted that this regime ‘presents serious risks that the informal and unregulated nature of this form of work will increase, disempowering workers through restricting their freedom to leave an abusive employer and fostering increased cases of modern slavery.’⁶⁶ Among other things, the report proposed the drafting of a Modern Slavery Act. In preparation for the drafting of this Bill, the Joint Committee on the draft Modern Slavery Bill published a report in which it also expressed its disapproval of these visa changes, noting that they ‘have unintentionally strengthened the hand of the slave master against the victim of slavery’.⁶⁷

During the Bill’s readings, Members of Parliament raised the issue of migrant domestic workers, urging the Home Secretary to rectify the situation.⁶⁸ A clause was initially tabled and considered during the House of Commons Committee stage, reiterating the elements of the 1998 visa. Nevertheless, the clause was rejected both at the Committee and Report Stage and was also withdrawn at the House of Lords Committee stage.⁶⁹ Lord Hylton subsequently tabled a new amendment under which

⁶⁵ Kalayaan, ‘Britain’s Forgotten Slaves’.

⁶⁶ Slavery Working Group, ‘It Happens Here: Equipping the United Kingdom to fight modern slavery’, Centre for Social Justice, 2013, pp. 92–93.

⁶⁷ House of Lords/House of Commons, para. 5.

⁶⁸ House of Commons Debate (HC Deb), 8 July 2014, vol. 584, col. 167.

⁶⁹ Modern Slavery Bill Debate, 14 October 2014, col. 503; HC Deb, 4 November 2014, vol. 587, col. 780; House of Lords Debate (HL Deb), 10 December 2014, vol. 757, col. 1872.

migrant domestic workers could change employers, as long as they notified the Secretary of State of this change.⁷⁰ Regrettably, on 25 March 2015 the House of Lords voted against this amendment, leaving the majority of migrant domestic workers outside the remit of the Modern Slavery Act 2015.⁷¹ The government announced the launch of an independent inquiry on this issue that was scheduled to report its findings by the end of July 2015.⁷² At the time of writing, no such report has been published.

The only relevant provision in the Act relates to migrant domestic workers who have been identified as slavery or trafficking victims by the NRM; granting them a six-month visa as domestic workers. While this provision is welcome, it is merely an *ex post facto* solution in a poor attempt to rectify the failings of the immigration regime. As Lord Hylton noted, under this provision '[...] the worker must first endure a period of abuse and exploitation, then escape, and then find the national referral mechanism.'⁷³ Accordingly, this provision provides no safeguards for domestic workers until a positive NRM decision comes through, a process that, according to the Anti-Trafficking Monitoring Group, is in itself flawed and discriminatory.⁷⁴

While the international community has been fighting for the eradication of forced labour, servitude and slavery, the UK willfully chose to disregard the visible effects of this visa, and to revert toward a regime closely resembling the *Kafala*. The two systems tie migrant domestic workers to a named employer and dictate that any attempt to change or flee will lead to the worker becoming undocumented. The inability to change employers and the finite period of time to remain in the destination country create an easily exploitable group with no viable recourse to support or redress. These provisions become increasingly unjustifiable when one considers that UK labour law partly excludes domestic workers, and where provisions do extend to them, they have proved problematic in enforcement. Inadequate labour protections are therefore added to the equation to produce a formula for abuse and exploitation.

⁷⁰ HL Deb, 25 February 2015, vol. 759, col. 1689.

⁷¹ HL Deb, 25 March 2015, vol. 760, col. 1449.

⁷² HC Deb, 17 March 2015, vol. 594, col. 681;

⁷³ *Ibid.*, col. 1432.

⁷⁴ Anti-Trafficking Monitoring Group (ATMG), 'Hidden in Plain Sight: Three years on: Updated analysis of UK measures to protect trafficked persons', ATMG, 2013, p.8.

Domestic Workers and UK Labour Law

As Taran and Geronimi note, a ‘major incentive for exploitation of migrants and ultimately forced labour is the lack of application and enforcement of labour standards in countries of destination as well as origin...’⁷⁵ One could partly attribute non-enforcement of labour standards in domestic work to its link with household tasks that have been traditionally perceived as merely women’s work in the home.⁷⁶ This perception is reflected in the legislation of many countries, which either exclude domestic workers entirely from labour protections or apply labour law selectively to them.⁷⁷ As Mantouvalou notes, the lower protection afforded to domestic workers in the UK represents what she refers to as ‘legislative precariousness’.⁷⁸ This in turn ‘places domestic workers at disadvantage if compared to other groups of workers, and reinforces the relationship of submission and subordination that typically characterises the employment relation.’⁷⁹

Domestic workers in private households, both migrants and non-migrants, are explicitly exempt from a number of UK labour regulations. According to Regulation 19 of The Working Time Regulations 1998, the provisions on maximum weekly working time and the length of night work do not apply to domestic workers.⁸⁰ Moreover, they are exempt from the right to free health assessment for night workers and from the pattern of work provision ensuring that workers are provided with adequate breaks when the work pattern is such as to put their health and safety at risk.⁸¹ Section 51 of the Health and Safety at Work etc. Act 1974 also excludes domestic servants working in private households.⁸²

⁷⁵ P Taran and E Geronimi, ‘Globalization, Labor and Migration: Protection is paramount’, International Labour Office, 2002, p. 11.

⁷⁶ ILO, ‘Report IV(1)’, p. 1.

⁷⁷ For a comparison between the Domestic Workers Convention provisions and national labour laws, see Thomson Reuters Foundation for the Trust Women Conference.

⁷⁸ V Mantouvalou, ‘Human Rights For Precarious Workers’, p.137.

⁷⁹ Ibid.

⁸⁰ Contrary to the UK, Kuwait, a Kafala-supportive state, which for years has reportedly neglected the rights of migrant domestic workers, passed on 24 June 2015 new legislation granting domestic workers enforceable labour rights, including the right to a national minimum wage, maximum working hours and rest days. See: HRW, ‘Kuwait: New law a breakthrough for domestic workers’, HRW, 2015, retrieved 1 July 2015, <https://www.hrw.org/news/2015/06/30/kuwait-new-law-breakthrough-domestic-workers>

⁸¹ HM Government, Working Time Regulations 1998, SI 1998/1833, reg. 19.

⁸² HM Government, Health and Safety at Work etc. Act 1974, c. 37, s. 51.

Even though such workers are in theory entitled to the National Minimum Wage (NMW), they are often deprived of this right. A 2011 report found that of the ninety-two employment contracts and letters examined and held by the UK Border Agency (now superseded by UKVI), in only twenty was it established that the worker was paid at least the minimum wage.⁸³ This deprivation is partly attributed to a legal loophole found in the NMW Regulations. Regulation 2 states that the term ‘work’ does not include work relating to the family household of the employer that is done by a worker residing in the family home and who, even though not a family member, is treated as such, through elements such as the provision of accommodation and meals.⁸⁴ Even though this may not explicitly apply to all live-in domestic workers, it provides employers with leeway to argue that the worker is part of the family, in an attempt to avoid liability. Notably, the Court of Appeal has applied this exemption explicitly to domestic workers.⁸⁵

Some labour law provisions available to other workers do extend to domestic workers. For example, unless the employer is related to the domestic worker, the latter is in theory entitled to the statutory provisions relating to redundancy payments.⁸⁶ Furthermore, such workers have the right to paid holiday, statutory sick pay and statutory maternity leave.⁸⁷ Yet, the hidden nature of this employment makes the enforcement of such rights challenging. As noted, these workers are excluded from the Health and Safety at Work etc. Act 1974 that, among other provisions, includes a provision for labour inspections.⁸⁸ Therefore, authorities cannot easily ensure that these labour provisions are respected.

Workers entering a country under tied visas find themselves in an even more disadvantageous position. Dependence on employers for accommodation, food and legal status leaves workers with limited

⁸³ N Clarke and L Kumarappan, ‘Turning a Blind Eye: The British state and migrant domestic workers’ employment rights’, Working Lives Research Institute, 2011, p. 2, retrieved 25 January 2015, <http://workinglives.org/fms/MRSite/Research/wlri/WORKS/TabE%20final%20report.pdf>

⁸⁴ HM Government, National Minimum Wage Regulations 1999, SI 1999/584, reg. 2 (2) (a) (i), (ii).

⁸⁵ *Nambalat v. Taher & Anor: Udin v. Pasha & Ors* [2012] EWCA Civ 1249.

⁸⁶ HM Government, Employment Rights Act 1996, c.18, s.161.

⁸⁷ HM Government, Social Security Contributions and Benefits Act 1992.

⁸⁸ Health and Safety at Work etc. Act 1974, s.51.

bargaining power, preventing them from demanding respect of their labour rights. Additionally, the limited period for which they are allowed to remain in the UK also prevents them from enforcing their rights. While raising employment claims has always been challenging, due to the private environment of the work and the relationship between the parties, the current system hinders such claims even further. It is very unlikely that within the six months prescribed, the worker will find the courage to report the abuse, as well as commence and conclude legal action brought against the employer. While workers could potentially apply for a special residence permit that would enable them to remain for the duration of the proceedings, such a permit is often refused.

Conclusion: The way forward

Current UK labour laws are in clear contradiction with the spirit of the Domestic Workers Convention. Not only do the existing limited labour protections and the inability of domestic workers to seek legal redress become an incentive for exploitation, but they also reinforce gender disparities in relation to access to decent work. Since, the majority of domestic workers are women, poor working conditions and limited protections evidenced disproportionately affect them.⁸⁹ Therefore, not only is the need for adequate labour protections important for ensuring that this labour force is protected and able to realise their rights, but it is also vital for promoting gender equality. The UK must therefore ratify the Domestic Workers Convention to ensure, at a minimum, that labour rights commonly afforded to other workers, and to a great extent male workers,⁹⁰ are extended to domestic workers who are in the majority women.

The UK ratification of the Domestic Workers Convention is a vital step towards the protection of migrant domestic workers. Nevertheless, despite the obligation on states, as set out in Article 17, to implement a labour inspection mechanism for domestic workers, in practice this may not be adequate to protect workers. The article's wording itself seems tentative, noting that such a mechanism shall be implemented 'with due regard for the special characteristics of domestic work, in accordance with national laws and regulations'.⁹¹ Accordingly, this gives states discretion in the way in which

⁸⁹ ILO, 'Domestic Workers Across the World', p. 21.

⁹⁰ ILO, 'Preventing Discrimination, Exploitation And Abuse Of Women Migrant Workers — An information guide', Booklet 1, International Labour Office, 2003, p. 11.

⁹¹ ILO, Domestic Workers Convention, Article 17 (2).

they comply with the provision and justifies the retention of existing ineffective national labour inspection mechanisms. Indeed, even though a number of countries now allow such inspections to take place, they do so under certain conditions, such as obtaining the permission of the homeowner.⁹² Such conditions are self-defeating as they place overt control in the hands of the employer, comparable to the current UK immigration regime.

It is therefore imperative for the UK to take further preventative steps to eradicate the risk of exploitation. To do so, the current immigration regime for migrant domestic workers must be abolished. Regrettably, parliament failed to achieve this through the inclusion of a clause in the Modern Slavery Act 2015, and it remains to be seen whether the government will put the proposed immigration changes before Parliament. In any event, anything less than a return to the 1998 visa will not suffice in protecting migrant domestic workers from exploitation.

Importantly, while reverting to the 1998 visa will undoubtedly equip workers with bargaining power and the potential to leave an exploitative relationship, the new visa should go further and set out a number of requirements that UKVI should ask from employers. One such recommendation, proposed by the Working Lives Research Institute is for UKVI to require more detailed contracts and pay slips from employers.⁹³ This is a means of checking whether the remuneration received is both according to the initial contract and above the NMW. Furthermore, UKVI needs to become more active in enquiring into alleged abuse reported by migrant domestic workers and notifying the appropriate authorities. Research showed that it had in its possession details of abuse provided by workers when changing employers, yet no evidence was found that it had acted upon this information. Finally, UKVI must ensure that, when applying for a visa, domestic workers are informed of their rights and of how to obtain assistance while in the UK. Currently, as noted, authorities do not often comply with this obligation.

⁹² French Labour Code, Code Du Travail (Version Consolidée Au 30 Mai 2014) Huitième Partie: Contrôle de L'application De La Législation Du Travail Livre Ier: Inspection du Travail. Titre Ier: Compétences et Moyens D'intervention, Chapitre III: Prerogatives et moyens d'intervention, Section 1 Droit d'entrée dans les établissements, Article L8113-1, L8113-2.

⁹³ Clarke and Kumarappan, p.2.

ANTI-TRAFFICKING REVIEW 5 (2015): 69-88

The international community is witnessing both a movement towards decent work for domestic workers, as well as an effort for the eradication of human trafficking, forced labour, servitude and slavery. The UK must therefore ensure that both its labour and immigration provisions promote these ideals, rather than facilitate and enhance the exploitation of migrant domestic workers.

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Vulnerability to Forced Labour and Trafficking: The case of Romanian women in the agricultural sector in Sicily

Letizia Palumbo and Alessandra Sciarba

Abstract

This paper focuses on labour and sexual exploitation faced by Romanian female workers employed in the agricultural sector in Ragusa, Sicily, Italy. Drawing on fieldwork conducted in 2013 and 2014 with Romanian female farm workers in Ragusa, the paper identifies factors that contribute towards their vulnerability to exploitation. By paying specific attention to the experiences of women who are mothers with dependent children, we look at structural factors that increase their vulnerability and consider how this vulnerability ‘forces’ women into situations whereby they effectively accept and/or submit to abuse. We also highlight how European Union (EU) citizenship does not automatically protect migrants from such abuse. This is important because, as we argue, the mistreatment experienced by participants in this study can be regarded as cases of forced labour and trafficking, based on International Labour Organization (ILO) indicators¹ and the definition of trafficking provided by the Directive 2011/36/EU. For a long time, these cases have mostly been neglected by incompetent authorities or addressed using only repressive and assistentialist approaches. Thus, this paper also investigates the limits and potentialities of the Italian legal framework on trafficking, and the ways local institutions and organisations confront the rights violations occurring in the agricultural sector. We contend that in order to effectively counter these phenomena, labour rights measures and anti-trafficking interventions have to be combined based on a comprehensive approach

¹ ILO, ‘ILO Indicators of Forced Labour’, International Labour Office, 2012, retrieved 11 August 2015, http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—declaration/documents/publication/wcms_203832.pdf

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aimed not only at assisting victims, but also at tackling the structural factors that create their vulnerability.

Keywords: labour exploitation, sexual exploitation, European Union citizen migrants, female migrants, farm workers, human trafficking, forced labour, vulnerability, Italy, Romania

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Introduction

This paper examines the serious labour and sexual exploitation suffered by Romanian female workers employed in the agricultural sector in the area of Ragusa, Sicily, Italy. This article draws on analysis from a qualitative research project involving female migrant labourers in order to examine the links between feminisation of migration² and current forms of labour abuse, which coexist with sexual exploitation.³ We identify the structural factors that make Romanian female farmworkers in Ragusa vulnerable to exploitation, revealing also how European Union (EU) citizenship does not automatically protect migrants from being victims of serious abuse.

Special attention is dedicated to the stories of those migrant women who are mothers with dependent children and constantly negotiate, as several

² N Piper (ed.) *New Perspectives on Gender and Migration: Livelihood, rights and entitlements*, Routledge, Oxon, 2007 ; S Sassen, 'The Feminization of Survival: Alternative global circuits' in M Morokvasic, U Erel, K Shinozaki (eds.), *Crossing Borders and Shifting Boundaries. Gender on the move* (vol. I), VS Verlag für Sozialwissenschaften, Wiesbaden, 2003, pp. 59–77.

³ Human Rights Watch (HRW), 'Cultivating Fear. The vulnerability of immigrant farmworkers in the US to sexual violence and sexual harassment', HRW, 2012, retrieved 25 March 2015, <http://www.hrw.org/reports/2012/05/15/cultivating-fear> ; HRW, 'Claiming Rights. Domestic workers' movements and global advances for labor reform', HRW, 2013, retrieved 25 March 2015, http://www.hrw.org/sites/default/files/reports/globaldw1013_brochure_LOWRES_SPREADS.pdf ; Anti-Trafficking Monitoring Group (ATMG), 'Hidden in Plain Sight: Three years on: Updated analysis of UK measures to protect trafficked persons report', ATMG 2013, retrieved on 23 March 2015, http://www.antislavery.org/includes/documents/cm_docs/2013/h/hidden_in_plain_sight.pdf ; Amnesty International, 'My Sleep is My Fear. Exploitation of migrant domestic workers in Qatar', Amnesty International, 2014, retrieved 23 March 2015, <https://www.amnesty.org/en/documents/MDE22/004/2014/en/>

studies have stressed,⁴ new implications of motherhood, struggling with power relations and dynamics. These women face a combination of fundamental rights violations, including labour rights violations, which is based on the abuse of their particular position of vulnerability. Their vulnerability, as we argue taking into account the paradigm of ‘Sophie’s choice’ introduced by Eva Foeder Kittay,⁵ ‘forces’ them to make an ‘impossible’ choice between incomparable goods, leaving them with no viable alternative but to submit to the abuse.

In our view, from this perspective, the experiences of exploitation of these women can be regarded as cases of forced labour on the basis of the indicators provided by the International Labour Organization (ILO)⁶ and as cases of trafficking, according to the Directive 2011/36/EU on *Preventing and Combating Trafficking in Human Beings and Protecting its Victims*, which has adopted the definition of trafficking in the United Nations (UN) Trafficking Protocol.⁷ The latter is a broad definition, which, far from being limited to sexual exploitation, entails a wide range of forms of abuse.⁸

Though strongly related, trafficking and forced labour are not identical phenomena. Indeed, ‘not all forced labour involves trafficking and not all trafficking for labour exploitation amounts to forced labour.’⁹

⁴ G Herrera, ‘Stratified Workers/Stratified Mothers: Migration policies and citizenship among Ecuadorian immigrant women’ in W Chavkin and J M Maher (eds.), *The Globalization of Motherhood. Deconstructions and reconstructions of biology and care*, Routledge, New York, 2010, pp. 55–76 ; U Beck and E Beck-Gernsheim, *Lebensformen im globalen Zeitalter*, Suhrkamp Verlag, Berlin, 2011 ; F A Vianello, ‘A Transnational Double Presence: Circular migration between Ukraine and Italy’ in A Triandafyllidou (ed.), *Irregular Migrant Domestic Workers in Europe. Who Cares?*, Ashgate, Farnham 2013, pp. 187–211 ; L Benéria, ‘The Crisis of Care, International Migration and Public Policy’, *Feminist Economics*, vol. 14, 2008, pp. 1–21.

⁵ E F Kittay, ‘The Global Heart Transplant and Caring across National Boundaries’, *The Southern Journal of Philosophy*, vol. XLVI, 2008.

⁶ ILO.

⁷ In full: UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000.

⁸ M G Giammarinaro, ‘La direttiva 2011/36/UE sulla prevenzione e la repressione della tratta di esseri umani e la protezione delle vittime’, *Diritto, immigrazione e cittadinanza*, XIV, 1, 2012, pp. 15–33.

⁹ Inter-Agency Coordination Group Against Trafficking in Persons ‘ICAT’, ‘Preventing Trafficking in Persons by Addressing Demand’, ICAT, 2014, p. 2, retrieved 31 March 2015 http://www.ungift.org/doc/knowledgehub/events/ICAT_Demand_paper_-_FINAL.pdf

However, defining a clear distinction between forced labour and trafficking is highly controversial because they often overlap.¹⁰

Italian legislation does not regard forced labour as a specific offence.¹¹ For this reason, from a legal perspective, the concept of forced labour is not relevant in addressing the cases investigated in this article. Nevertheless, the ILO indicators can be useful for interpreting the level of exploitation involved.

Trafficking, instead, is defined as an offence under Article 601 of the Italian Penal Code (recently amended in order to adopt the definition of human trafficking contained in the Directive 2011/36/EU). At the same time, the Italian legal framework on trafficking, especially through Article 18 of the ‘Consolidated Act of Migration’ (Legislative Decree n. 286/1998), is, as explained below, particularly innovative regarding the assistance and the protection of victims.¹²

On the basis of these considerations, the paper also examines the limits and potentialities of Italian anti-trafficking legislation, and the ways local institutions and organisations in Ragusa and the surrounding area deal with the maltreatment occurring in the agricultural sector. We contend that in order to effectively counter these phenomena, labour rights measures and anti-trafficking interventions have to be combined based on a comprehensive approach, as promoted by the Directive 2011/36/EU,¹³ aimed not only at assisting victims, but also tackling the structural factors that lead to abuses. This comprehensive approach relies on the assumption that trafficking is a complex phenomenon in which several

¹⁰ ILO, for instance, highlights in its 2012 ‘Global Estimate of Forced Labour’ that ‘human trafficking can also be regarded as forced labour, and so this estimate captures the full realm of human trafficking for labour and sexual exploitation.’

¹¹ It is worth noting that in 1934, Italy ratified the Forced Labour Convention, 1930 (No. 29) Convention concerning Forced or Compulsory Labour, and in 1967 Abolition of Forced Labour Convention, 1957 (No. 105) Convention concerning the Abolition of Forced Labour.

¹² L. Palumbo, ‘Protection of Trafficked People in Italy: Policies, limits and challenges’, *Journal of Money Laundering Control*, 2015 (forthcoming).

¹³ By adopting a holistic and human-rights-based approach, the Directive 2011/36/EU has challenged the EU interventions on trafficking and/or labour exploitation focusing on criminal justice responses (such as Directive 2004/81/EC Residence Permit Issued to Third-Country Nationals Who Are Victims of Trafficking in Human Beings or Who Have Been the Subject of an Action to Facilitate Illegal Immigration, Who Cooperate with the Competent Authorities and Directive 2009/52/EC Providing for Minimum Standards on Sanctions and Measures Against Employers of Illegally Staying Third-Country Nationals).

different issues are in play (including migration policies, labour measures and practice, gender discrimination and violence). Therefore, far from being limited only to the use of criminal law instruments or to assisting victims, anti-trafficking measures also require the development and implementation of concerted measures aimed at addressing the root causes of migrant workers' vulnerability.

This article draws upon the analysis of interview data collected in 2013 and 2014 over two one-month periods in Ragusa. This study sought to investigate forms of exploitation suffered by female migrant workers in the agricultural sector and the factors that produce their vulnerability to abuse. The study was designed as a qualitative project drawing on both participant observation and in-depth interviews with twenty people in total.¹⁴ We conducted participant observation of the programmes implemented by the Proxima Association, such as the Proxima bus transport service, called Solidal Transfert, for migrant farm workers. The Proxima Association is based in Ragusa and offers various support services and assistance to victims of trafficking and labour exploitation with funding from Art. 13 of Act no. 228/2003¹⁵ and Art. 18 of Legislative Decree no. 286/98.¹⁶ Through the observation of the activities and initiatives carried out by Proxima we identified key actors and dynamics and capture major issues and challenges migrant women face in the area.¹⁷ The second part of the study involved in-depth qualitative interviews. We interviewed social workers, medics, nurses, local priests, members of the local council of Vittoria. We visited one of the farms to meet two female workers and met three Romanian women hosted in the Proxima Association shelter.¹⁸

¹⁴ The authors are both Post-Doctoral Researchers at the University of Palermo, Italy, with research projects both on topics of female migration, labour exploitation and trafficking. Given the affinity of our research projects, we decided to conduct a part of the fieldwork together in the area of Ragusa. The fieldwork was self-financed.

¹⁵ In full: Article 13 of the National Law against Trafficking in Human Beings (Law No. 228 of 2003). This legislation aims at providing immediate assistance and support to European and non-EU victims of slavery and trafficking. It ensures adequate accommodation, social assistance and healthcare services.

¹⁶ In full: Article 18 of the National Law on Migration (Legislative Decree No 286 of 1998).

¹⁷ As for the method of participant observation, see H R Bernard and C C Gravlee (eds.), *Handbook of Methods in Cultural Anthropology*, Second Edition, Rowman and Littlefield, Lanham, 2014. During the participant observation, all people were informed about the purpose and methods of the research.

¹⁸ We identified and contacted informants interviewed both with the help of the Proxima Association and using the 'snowball method'. We applied the principles of confidentiality and anonymity rigorously, and participants gave consent for the disclosure of the name of their organisations or institutions. The purpose, methods and possible uses of the research were made absolutely clear to all those involved in the research. The interviews were conducted and recorded by both authors, and transcribed and analysed jointly.

Stories of Labour and Sexual Exploitation in the Agricultural Sector in Ragusa

The agricultural sector in Sicily, as in many other Italian regions, especially in the south of the country, has been affected by the new agricultural regime characterised by corporate concentration upstream and downstream of farming.¹⁹ In this context, under the pressure and costs of large production and distribution systems, many local agricultural producers turn to employment of a low-paid migrant labour force.²⁰

According to official data, around 12,000 migrant workers are currently employed in the agriculture sector in the so-called ‘transformed area’²¹ of Ragusa.²² However, this data does not reflect widespread undeclared work. The lack of regulation is a structural component of the agricultural sector in this part of Sicily, which is characterised by the presence of small- and medium-sized farms that are difficult to monitor.

Working in the greenhouses is without doubt a ‘dirty, dangerous, demeaning, and demanding’²³ job and reserved for migrant workers. Migrant farm workers in the transformed area work 10–12 hours a day, breathing in toxic pesticides, and suffering the summer heat and the winter cold, for a pay that is EUR 15–20 (USD 17–22) per day. Many workers live on the farms, isolated in the countryside, in decrepit buildings with no heating or toilets.

Until the end of the 1970s, exploited workers in the transformed area of Ragusa were mostly Tunisian men. However since 2007, when Romania joined the EU, the number of Romanian migrants has increased, gradually reaching that of Tunisians.²⁴ There are two principal reasons

¹⁹ H Bernstein, *Class Dynamics of Agrarian Change*, Pluto and University of Michigan Press, Fernwood, 2010.

²⁰ A Mangano, *Ghetto Economy. Dai festini agricoli alle baraccopoli di Stato, l’orrore dietro l’etichetta del supermercato*, terrelibere.org, Praça da Alegria, 2014.

²¹ The so-called ‘transformed area’ is the territory around Marina di Acate, Vittoria and Santa Croce Camerina. The name derives from the fact that this area has been changed by the building of thousands of greenhouses, leading to the conversion of seasonal farming patterns to permanent, year round farming.

²² Flai-Cgil, Osservatorio Placido Rizzotto, Idos (ed.), *Immigrazione Dossier Statistico 2014—Rapporto UNAR. Dalle discriminazioni ai diritti*, Edizioni IDOS, Rome, 2014.

²³ J Carens, *The Ethics of Immigration*, Oxford University Press, Oxford and New York, 2013, p. 123.

²⁴ Idos, pp. 278–279.

for this. First, the employment of EU citizens allows employers to avoid the offences of exploitation and facilitation of illegal migration. Second, recently arrived Romanian workers are 'cheaper' than Tunisians who have been in this area for a long time, have developed solid relationships with the local people and are mostly unionised.

The growth in the number of Romanian workers in agriculture has led to an increase in the presence of female workers, as the general process of feminisation of migration is particularly represented within Romanian emigration. This is due to a complex overlapping of gender and familial dynamics and labour market processes. Since the 1990s, after the collapse of the socialist system, many Romanian women migrated to increase the wealth of their family, becoming the principal breadwinners, and in this way challenging traditional gender roles.²⁵

When these women move to southern European countries, in contexts of race- and gender-based labour market segmentation,²⁶ most of them are employed in domestic work, but many also work in agriculture, especially if they had previously worked as farm labourers in their country of origin.²⁷ Some have moved alone, and, in most cases, the money they earn is for supporting their parents and children in Romania. Others have migrated with their family and frequently 'prefer' to work as farm workers in order to be with their children.²⁸ As Ivana²⁹ told us:

I work here [on the farm] for my daughter, and she lives with me. If I worked [as a domestic worker] in a family, I could not bring her with me. In the house of an old person you cannot bring children...³⁰

The presence of thousands of Romanian female farm workers, exploitable and invisible, has immediately had significant psychological

²⁵ C Bezzi, 'Romania: Lo stigma sulle madri migranti', Osservatorio Balcani e Caucaso, 2014, retrieved 7 December 2014, <http://www.balcanicaucaso.org/aree/Romania/Romania-lo-stigma-sulle-madri-migranti-147542>

²⁶ F Anthias and G Lazardis (eds.), *Gender and Migration in Southern Europe: Women on the move*, Berg, Oxford-New York, 2000; 'Special Issue: Gendered mobilities and work in Europe', *Journal of Ethnic and Migration Studies*, vol. 39, issue 4, 2013.

²⁷ This explains why on the farms of Ragusa there are thousands of Romanian women, most of whom come from the countryside area of Botoshani.

²⁸ There is no clear data on the number of minors on the farms.

²⁹ All of the names of the women we interviewed are fictitious in order to protect their privacy.

³⁰ Interview with Ivana, Vittoria, 29 March 2014.

and social consequences with respect to local male employers in the Ragusa area. As a priest in Vittoria city told us:

After the arrival of the Romanian women, Sicilian men rediscovered the 'pleasure' of the countryside [...]. They began returning home later and later... They also organise sex parties in which each employer offers the migrant women employed in his greenhouses.³¹

Labour exploitation, therefore, has been accompanied by sexual abuse. As shown below, there is a dynamic of blackmail: migrant women who work in the greenhouses know that, in order to keep their job, sooner or later, they will probably have to go along with sexual requests of the employer.

A relevant datum to help understand the extent of this phenomenon is the increase in the number of abortions in the area. Nurses at the Vittoria Hospital informed us that every week about eight have abortions, and usually about five or six of them are Romanians. Providing more detailed information, a female doctor from a clinic in Ispica, a town in the area of Ragusa, affirmed that:

Romanian women are often accompanied by men, who are most of the time Italians. Often [the women] are young girls [...] and the men speak in their stead. [These men] say that they are friends or acquaintances, and take care not to leave them alone with me.³²

It certainly does not follow that all Romanian women who have decided have an abortion in Vittoria have been victims of sexual exploitation. However, the high number of abortions in proportion of the few thousands of inhabitants of this city is an important fact that must be considered in order to grasp the problematic conditions faced by female workers on the farms in Ragusa.

Seeking to counter these labour and sexual abuses, the Proxima Association, in cooperation with the trade union Flai-Cgil, has developed

³¹ Interview with a priest, Vittoria, 26 July 2013.

³² Interview with a doctor, Ispica, 25 July 2013.

a bus transport service called Solidal Transfert to provide migrant workers with the possibility to travel from the countryside to the towns, thus avoiding having to pay local people who take advantage of them and charge high fees for transportation. The bus service also serves as a venue for building relationships of trust and support with potential victims. For this reason, a psychologist, a social worker and a member of the Flai-Cgil are present on the bus.

Through this service, Proxima has met many Romanian women who have been subjected to double abuse: labour and sexual.

As the president of Proxima told us, most of the cases of concern involve women who live on area farms with their children. For example, Luana, one of the women helped by Proxima, used to work and live on a small farm near Vittoria with her young daughter and son. Every day, the employer took her children to the area school, which was far from the farm. In exchange for this 'favour', he asked Luana to have sex with him. In order to protect her children and keep her job and accommodation, she accepted this situation. The only reason she finally decided to escape was because she was worried for her children's safety:

This woman had an enormous capacity to endure suffering. She told me, 'I am obliged because I have my children [...]'. When he started to refuse to take her children to school, she began to refuse to have sex with him, and so he stopped giving drinking water to her and her children.³³

Everybody knows about the hard living and working conditions of migrant women in the greenhouses, but few people and institutions decide to act against them. Widespread *omertà*³⁴ and silence, because of fear or personal interests, characterise citizens' behaviour. And for some time the attitude of local political institutions has not been much different. As the former local councillor for social policies in Vittoria explained to us, politicians do not care about protecting migrants, as 'they do not vote, while the people who exploit them are citizens who vote...'³⁵

³³ Interview with the President of Proxima, Ragusa, 29 March 2014.

³⁴ This term refers to a specific code of silence relating to unfair activities.

³⁵ Interview with the former local councillor for social policies, Vittoria, 29 March 2014.

For many years, Proxima has tried to organise a meeting with the Prefecture (local governmental agency) of Ragusa. But it was only recently, in October 2014, that a meeting was scheduled, leading to the development of a working group that involves trade unions, trade associations, non-governmental organisations, institutions and the authors of this paper, as researchers. This working group was created after the publication in a national newspaper of a shocking article on cases of sexual abuse in the greenhouses,³⁶ an article that relied on our studies³⁷ and that reached over million online views in one week.

Lack of Alternatives, Vulnerability to Forced Labour and Trafficking

In our view, the stories of exploitation faced by female farm workers in Ragusa can be defined as cases of both forced labour and trafficking. They are in accordance with the forced labour indicators provided by the ILO,³⁸ as these stories are characterised by the interplay of ‘excessive overtime’; ‘abusive working and living conditions’; ‘withholding of wages’; ‘intimidation and threats’; ‘physical and sexual violence’; ‘isolation’; and, above all, ‘abuse of vulnerability’.³⁹ These stories of exploitation also fit within the Directive 2011/36/EU on human trafficking, as the ‘abuse of a position of vulnerability’ is articulated as one of the ‘means’ of trafficking. The Directive describes the position of vulnerability as ‘a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved’.⁴⁰

³⁶ A Mangano, ‘Violentate nel silenzio dei campi a Ragusa. Il nuovo orrore delle schiave rumene’, *L’Espresso*, 14 October 2014, retrieved 10 November 2014, <http://espresso.repubblica.it/inchieste/2014/09/15/news/violentate-nel-silenzio-dei-campi-a-ragusa-il-nuovo-orrore-delle-schiave-rumene-1.180119>

³⁷ A Sciarba, ‘Effetto serra. Le donne rumene nelle campagne del ragusano’, *L’Altro Diritto*. Centro di documentazione su carcere, devianza e marginalità, 2013, retrieved 30 November 2014, <http://www.altrodiritto.unifi.it/ricerche/migranti/ragusa.htm>; L. Palumbo and A. Sciarba, ‘Le donne delle serre. Storie di sfruttamento nelle campagne del ragusano’, *Melting Pot*, 16 April 2014, retrieved 30 November 2014, <http://www.meltingpot.org/Le-donne-delle-serre.html#.VLqjHSx0y00>.

³⁸ ILO.

³⁹ According with the ILO, ‘the presence of a single indicator in a given situation may in some cases imply the existence of forced labour. However, in other cases you may need to look for several indicators which, taken together, point to a forced labour case’, *Ibid.*

⁴⁰ Directive 2011/36/EU, Art. 2(2).

Although, in a context marked by a strong increase in poverty and precariousness, most of the workers experience exploitative conditions, especially the abuse of a position of vulnerability. However, not all the cases of labour exploitation can be viewed as forced labour and trafficking, and it is necessary to look at each on a case-by-case basis. In our view, it is possible to say that trafficking and forced labour occur when people are subjected to diverse human rights violations, including labour rights violations, and are unable to escape such a situation because they are threatened, segregated or isolated, or have a debt to pay or are obliged, due to diverse structural factors, to choose between some incomparable goods that are put in concurrence: for example, personal safety and the need to financially sustain themselves and their families.

This is exactly what many Romanian female workers experience in the greenhouses of Ragusa. As the president of Proxima highlights, many Romanian female workers in Ragusa are experiencing a specific position of ‘subjugation and subjection’, which matches the abuse of a position of vulnerability illustrated in the Directive 2011/36/EU, and this hence leads to redressing their exploitation through the framework of trafficking.⁴¹

It is worth noting that Romanian women’s condition of vulnerability is produced by an interaction of structural factors, which are primarily connected to the reasons that lead these women to emigrate. Over the last decade, Romania has become the first EU country of emigration—in 2010, 2.3 million Romanians lived in other EU member states⁴²—due to general impoverishment after the collapse of the socialist regime. The recent introduction of the capitalist system has led to a destruction of the existing economy, prompting an exponential increase in unemployment, and a rise in the cost of living, especially in cities. This rise has also been caused—in a vicious feedback loop—by new economic standards brought about by migrant remittances.⁴³ Since emigration has become the only possible solution for the country to face the social, political and economic transformations that have occurred, the need to

⁴¹ Interview with the President of Proxima, Ragusa, 29 March 2014.

⁴² C Vargas-Silva, ‘EU Migrants in other EU Countries: An analysis of bilateral migrant stocks’, The Migration Observatory at the University of Oxford, 2012, retrieved on 26 November 2014, <http://www.migrationobservatory.ox.ac.uk/sites/files/migobs/EU%20migrant%20stocks.pdf>

⁴³ C Popescu and L Juverdeanu, ‘Are Remittances Important for the Romanian Economy?’, *Annals of the University of Oradea Economic Sciences*, vol. 2, 2008, pp. 392–396.

send money home to family often leads migrant workers to persevere through the hard working conditions they suffer in the country of arrival. Many see Italy as a temporary place to work, and not as a country in which to build their lives.

On the other hand, in many countries of destination various labour market sectors, such as the agricultural industry,⁴⁴ have become increasingly dependent on a migrant labour force, considered exploitable and cheap.⁴⁵ This system, which has been consolidated in the current economic crisis, allows businesses to contain the cost of production and increase profit margins, undermining the protection of workers' labour rights.

In this scenario, EU migrants often risk being involved in contexts of informality and invisibility even more than non-EU migrants. For example, the fact that they do not need a permit of stay linked to an employment contract and to residency renders them more likely to end up in informal and undeclared situations. In addition to these elements, the illegal recruitment of Romanian workers is less risky for the employers, because they avoid incurring the offences of facilitation and exploitation of irregular migration.

Paradoxically, therefore, EU migrants can often be more exposed to labour abuse than non-EU irregular migrants. Their possibility of moving with no restrictions across EU boundaries, often developing circular paths, does not correspond to a real access to rights and social justice.

These underlying structural factors are compounded by gendered power relations. Migrant women's vulnerability derives from the interplay of gender discrimination and inequalities related to race, class, nationality, etc.⁴⁶ As Sassen argues, 'being an "immigrant woman" becomes the systemic equivalent of the offshore proletariat with its lack of power and lack of political visibility.'⁴⁷ Being a low-paid and suitable labour

⁴⁴ Istituto Nazionale di Economia Agraria, 'Indagine sull'Impiego degli Immigrati in Agricoltura in Italia', Istituto Nazionale di Economia Agraria, 2012.

⁴⁵ C Colloca and A Corrado (eds.), *La Globalizzazione delle Campagne. Migranti e società rurali nel Sud Italia*, Franco Angeli, Milano, 2013.

⁴⁶ K Crenshaw, 'Mapping the Margins: Intersectionality, identity politics, and violence against women of color', *Stanford Law Review*, vol. 43, 1991, pp. 1241–1299; J Nash, 'Re-thinking intersectionality', *Feminist Review*, vol. 89, 2008, pp. 1–15

⁴⁷ S Sassen, 'The Other Workers in the Advanced Corporate Economy', *The Scholar and Feminist Online*, vol. 8, issue 1, 2009.

force, migrant women ‘provide the flexibility that global capital needs.’⁴⁸ Thus, despite the financial crisis, female migration has been encouraged by the demands of the labour market much more than male migration in countries of destination.⁴⁹ This trend augments the risk of accentuating the segregation of female migrant workers in market niches⁵⁰ marked by dynamics of abuse within which labour and sexual exploitation often simultaneously occur.⁵¹

At the same time, their condition of vulnerability can be aggravated by family responsibilities, above all if they are mothers.⁵² When women move alone without their children, like the majority of those who do domestic work in the country of arrival, their priority is to make money to send home to the country of origin, even if this often involves being exploited. When women migrate with their children, they can often be used as an instrument of explicit blackmail by employers as the story of Luana, the Romanian woman helped by the Proxima Association, reveals. In these situations, vulnerability is also exacerbated by social isolation and geographical segregation as structural characteristics of migrants’ exploitation in the Italian agricultural sector.⁵³

The lack of real alternative working contexts, which guarantee these women the protection of their labour rights, together with other fundamental human rights, and, at the same time, the possibility to economically support their family and stay close to their children, leads them to ‘accept’ working under conditions of abuse and sexual exploitation. These situations ‘*de facto* negate the principle of freedom of choice, the absence of which is one of the elements of forced labour’.⁵⁴ In such circumstances, as Directive 2011/36/EU affirms, the consent of the victim is irrelevant in legally defining cases of trafficking.⁵⁵

⁴⁸ F Anthias, ‘Metaphors of Home: Gendering new migrations to Southern Europe’ in Anthias and Lazardis, p. 25.

⁴⁹ Organisation for Economic Co-operation and Development (OECD), ‘Closing the Gender Gap: Act now’, OECD, 2012.

⁵⁰ N Piper, *International Migration and Gendered Axes of Stratification—Introduction*, in Piper.

⁵¹ See footnote 1.

⁵² U Beck and E Beck-Gemshem; F A Vianello; L Benéria.

⁵³ D Perrotta and D Sacchetto, ‘Il Ghetto e lo Sciopero: Braccianti stranieri nell’Italia meridionale’, *Sociologia del Lavoro*, vol. 128, 2012, pp. 152–166.

⁵⁴ K Skrivankova, ‘Between Decent Work and Forced Labour: Examining the continuum of exploitation’, Joseph Rowntree Foundation, 2010, p. 19, retrieved 18 November 2014, http://www.prostitutionresearch.info/pdfs_all/trafficking%20all/forced-labour-exploitation-full.pdf

⁵⁵ Directive 2011/36/EU, Art. 2(4)

The issue of consent in the context of trafficking has been at the centre of an intense debate among feminist scholars and activists, mainly focused on the topic of trafficking for sexual exploitation. In particular, in contrast with neo-abolitionist feminists who argue that no women can ever consent to prostitution,⁵⁶ sex workers' rights feminists have challenged the idea that all women in the sex trade are powerless victims, stressing the agency of migrants involved in the sex industry, and the complexity of their choices and experiences.⁵⁷

In line with this standpoint, we argue that, far from being passive victims, Romanian women in the Italian greenhouses constantly respond to, grapple with or try to struggle against power relations, seeking to negotiate between personal needs and desires, external influences and contingent events. From a theoretical perspective, it is important to take into account the complex ways in which 'consent' takes shape. Significant in this regard is the work by philosopher Kittay on migrant female caregivers who have left their children behind in the country of origin. Kittay defines their options as 'Sophie's choices' in which 'either [is] disjunct is morally unsavory',⁵⁸ because some incomparable goods are put in concurrence. Kittay describes that, on the one hand, women need to migrate to ensure their children adequate standards of living; and on the other, due to restrictive labour mobility for women, most of the time they have to work as domestic workers in very severe conditions, in violation of many labour rights. Further, they cannot bring their children with them, in breach of the right to family union.⁵⁹ In the case of the Romanian women working in the greenhouses in Ragusa, as we mentioned, we find the same kind of choice made in an opposite situation: most of these women do not leave the family in Romania, because many employers allow them to live with their children on the farms. But in order to stay with them, and due to the lack of other employment alternatives, the women have to 'accept' the dynamics of exploitation.

⁵⁶ C A MacKinnon, *Toward a Feminist Theory of the State*, Harvard University Press, Cambridge, 1989; K Barry, *The Prostitution of Sexuality: The global exploitation of women*, University Press, New York, 1995.

⁵⁷ J Doezema, 'Who Gets to Choose? Coercion, consent, and the UN Trafficking Protocol', *Gender and Development*, vol. 10, issue 1, 2002, pp. 20–27; L Agustín, *Sex at the Margins: Migration, labour markets and the rescue industry*, Zed Books, London, 2007.

⁵⁸ Kittay, p. 148.

⁵⁹ A Sciuuba, *La Cura Servile, La Cura Che Serve*, Pacini Editore, Pisa, 2015, pp. 153–161.

The lack of real and concrete alternatives, together with the fear of repercussion and isolation, leads many women not to report the abuses to the police. Moreover, this often pushes those who have been able to free themselves from exploitation to go back to work on the farms, and risk getting involved again in situations of violence and isolation. For example, as the president of Proxima told us, Luana, after escaping from the farm through the help of the association:

...decided to go back to work in another greenhouse instead of staying in our shelter and participating in our path of social protection... These women are right when they think that we are not able to find any alternatives for them ... In the last two years it has been extremely difficult to find an alternative and decent job for them.⁶⁰

The Italian Legal Framework and Inadequacies

As many studies point out, Italian legal instruments developed to protect workers from labour exploitation have proven inadequate.⁶¹ In particular, in 2011, the government adopted Legislative Decree no. 148/2011, which defines the crime of ‘unlawful gangmastering and labour exploitation’ through new Art. 603-bis of the Penal Code. Though this constitutes an important provision, doubts have been expressed about its efficacy in combating labour exploitation because it seems to primarily address abusive intermediaries and not abusive employers,⁶² who often control the former. Doubts also exist over the efficacy of Legislative Decree no. 109/2012, which transposes the Directive 2009/52/EU on sanctions for employers of irregular migrants. It offers a very restrictive definition of ‘particularly exploitative working conditions’, which does not conform to that offered by the Directive. Furthermore, the main aim of this

⁶⁰ Interview with the President of Proxima, Ragusa, 29 March 2014.

⁶¹ Amnesty International; V Castelli (ed.), *Punto e a Capo Sulla Tratta. Uno studio sulle forme di sfruttamento di esseri umani in Italia e sul sistema di interventi a tutela delle vittime*, FrancoAngeli, Milano, 2014.

⁶² Amnesty International; Group of Experts on Action against Trafficking in Human Beings (GRETA), ‘Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Italy’, GRETA, 2014.

Decree is to address and combat irregular immigration, and not to protect the rights of victims.⁶³

In Italy the crime of trafficking is outlined under Art. 601 of the Penal Code, which is related to Art. 600 of the Penal Code on 'Placing or Holding a Person in Conditions of Slavery or Servitude'. However, the number of convictions is very low, because investigations are long and expensive, and because 'the victim's initial statement is often not admissible in court. The prosecution therefore has to gather substantial evidence prior to the court hearing'.⁶⁴

With regard to the assistance and protection of victims, the Italian legal framework on trafficking is however particularly innovative in the international scene. Italian legislation, especially through Art. 18 of the Legislative Decree no. 286/1998, provides victims of trafficking and serious exploitation (both EU and non-EU citizens) with two paths through which assistance, protection, and, in the case of irregular migrants, a residence permit can be granted. The first is a 'judicial path' that is dependent on the victim's report, and the second is a 'social path' that is not contingent on any kind of victim participation in the proceedings against the exploiters.⁶⁵ Moreover, Art. 18 is applied irrespective of the outcome of proceedings or of the juridical qualification of the crime.

Despite this progressive approach, there are important problems with its implementation.⁶⁶ In particular, the so-called 'social path' is rarely applied, especially for irregular non-EU migrants who, in order to obtain assistance and a residence permit, are frequently 'forced' to report the abuse to the police and to cooperate with law enforcement authorities.⁶⁷ In the case of EU citizen migrants, as the experience of Proxima demonstrates, the social path is frequently implemented, as the victims do not need a residence permit.

⁶³ Palumbo, 'Labour Exploitation'.

⁶⁴ GRETA, p. 70.

⁶⁵ In this respect, it is worth mentioning that the residence permit granted by Article 18 can be converted into a work or study permit.

⁶⁶ GRETA; Castelli; L. Palumbo, 'Protection of Trafficked People in Italy: Policies, limits and challenges', *Journal of Money Laundering Control*, 2015 (forthcoming).

⁶⁷ GRETA; OSCE, Report by Maria Grazia Giammarinaro, OSCE Special Representative and Coordinator for Combating Trafficking in Human Beings, following her visit to Italy from 17–18 June and 15–19 July 2013, OSCE, 2014.

However, as in the case of Luana, the activation of the social path does not prevent women with strong economic responsibilities from taking work again in situations that are potentially exploitative. Though the social assistance programme under Art. 18 provides victims with long-term accommodation, training courses, access to social services, legal advice and psychological follow-up, the inclusion of victims in a non-exploitative labour context is difficult to achieve, especially in the south of Italy, which is characterised by a very weak economy. This often forces victims to go back to work in exploitative conditions.

The recent Legislative Decree 2014 no. 24, adopted in March 2014 to implement the Directive 2011/36/EU, also presents important limitations. It has amended the provisions for anti-trafficking without developing a holistic approach. Indeed, it overlooks the need for the adoption of a gender perspective capable of addressing differences, and of adequately taking into account diverse needs, in the trafficking experiences of men and women. In addition, it has not adopted some key provisions introduced by the Directive, including those on the irrelevance of the consent of the victims; non-prosecution of, or non-application of penalties to, the victim (Art. 8); and adequate and unconditional assistance (Art. 11). Finally, Article 1 of the Decree identifies specific groups of people vulnerable to trafficking, and in this way appears not to take into account the systemic character of current forms of exploitation. But above all, by choosing not to adopt the definition of the position of vulnerability offered by the Directive, the Decree seems to ignore the contemporary structural factors that create vulnerability to exploitation. This inadequate institutional approach to trafficking is also reflected in the lack of a national plan against trafficking (at the time of this writing), as well as of a solid and homogeneous system of identification of victims.

Far from developing a comprehensive approach, Italian interventions against labour exploitation and trafficking risk anchoring themselves in a mainly repressive approach and assistentialist vision, aimed at ‘rescuing’ victims, leaving intact those factors that make serious exploitation and trafficking a structural component of the contemporary labour market.⁶⁸

⁶⁸ H Shamir, ‘A Labor Paradigm for Human Trafficking’, *UCLA Law Review*, vol. 60, no. 1, 2012, pp. 76–136.

Conclusion: The need for a comprehensive approach

The case of Romanian female farm workers shows how the combination of some structural factors can generate a situation in which people, even EU citizens, in positions of vulnerability, have no feasible alternatives but to be subjected to forms of trafficking and forced labour. The absence of alternatives can be due to the fact that people find themselves 'forced' to choose between fundamental goods that never should be put in concurrence.

In order to address the sources of this kind vulnerability and, accordingly, to challenge a system of black markets, labour exploitation and sexual abuse, the adoption of a comprehensive perspective built on human rights standards, including labour rights, is indispensable.

A comprehensive approach inevitably implies long- and medium-term aims. Certainly, the first systemic factors that should be tackled in the long term are the deep economic disparities among countries. In a context of global injustice, as Hochschild writes, women choose to migrate to work abroad, 'but they choose it because economic pressures all but coerce them to. The yawning gap between rich and poor countries is itself a form of coercion',⁶⁹ which can lead to the 'Sophie's choice'.

On the other hand, medium- and short-term objectives should include actions aimed at strengthening and monitoring the respect of labour rights standards by promoting, for example, economic and legal incentives for non-exploitative business to help them in upholding labour rights standards and bearing costs of production. In this regard, the provisions offered by the 2014 ILO Forced Labour Protocol, which makes clear the need to adopt effective strategies of prevention and protection, can be extremely useful. Furthermore, changes should also encompass the creation of more legal and viable migratory channels; the disentanglement—also for EU citizen migrants—of a long-term residence permit from the person's income; the development of a transnational welfare system, based on new forms of interdependence between social systems of countries of emigration and immigration;⁷⁰

⁶⁹ A R Hochschild, 'Love and Gold', *S&F Online*, issue 8.1, 2009.

⁷⁰ F Piperno and M Tognetti Bordogna (eds.), *Welfare Transnazionale. La frontiera esterna delle politiche sociali*, Ediesse, Roma, 2012.

and the implementation of effective measures against gender discrimination and violence.

The work started by the local institutions, associations and experts in Ragusa to address the abuses occurring in the greenhouses seems to move towards addressing some of these points. The working group has proposed various forms of interventions to tackle the structural factors that render migrant workers vulnerable. More specifically, one initiative is creating a centre to provide social and legal support to farm workers, mainly those with children. Furthermore, in order to facilitate the recruitment of victims of trafficking in ethically correct businesses, the working group aims to define a sort of ‘white list’ of farms, a list that also has an important symbolic role in a context affected by illegality. Grounded in the experiments carried out in other Italian regions,⁷¹ the working group also seeks to alter the local agricultural industry through the use of legal and economic incentives for employers who, for example, demonstrate that they have legally hired a number of workers commensurate with the crops produced. The implementation of such measures would constitute a significant and scaled-down example of a comprehensive approach to forced labour and trafficking.

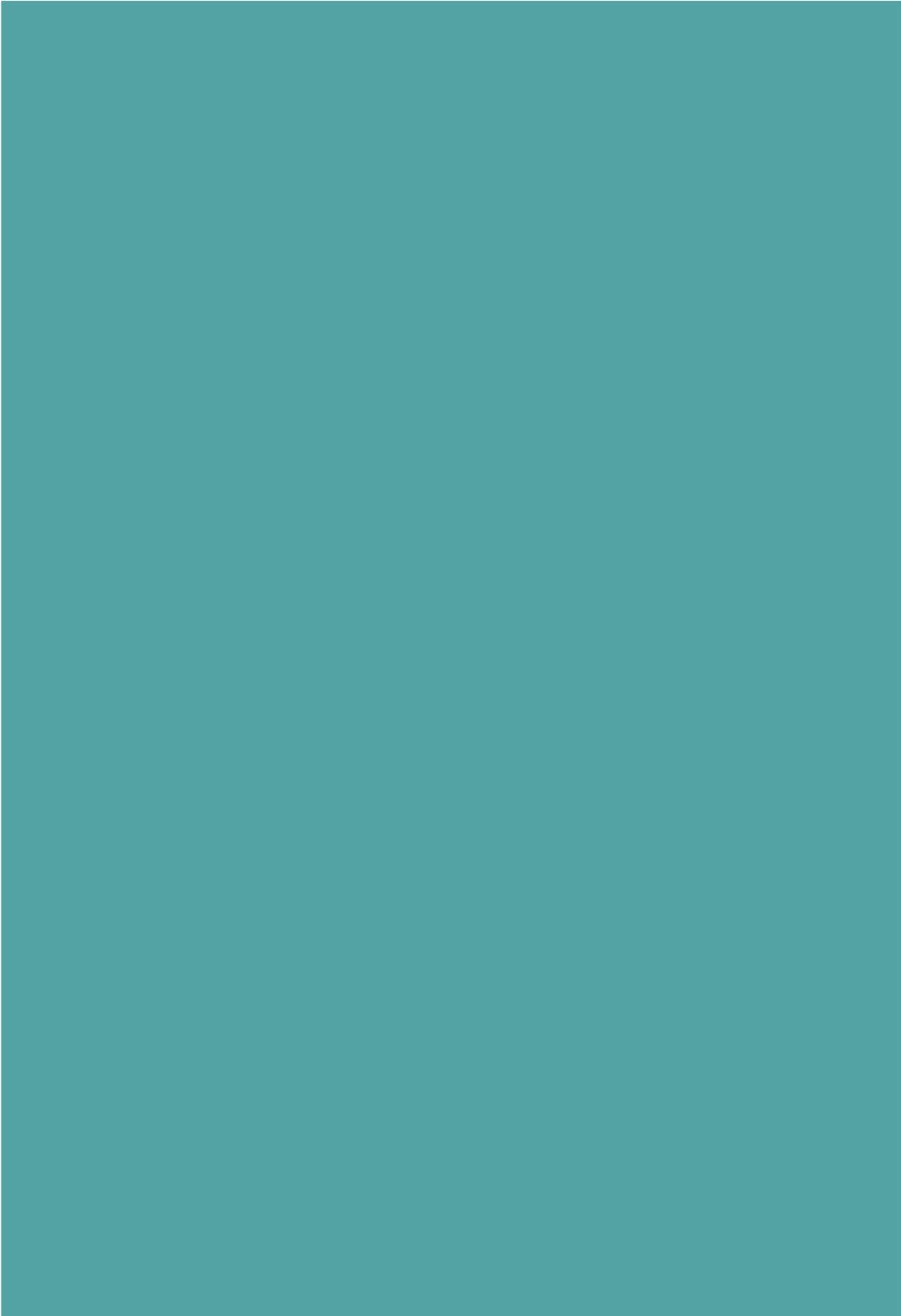
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⁷¹ See for example law 28/2006 of the Region of Apulia, which allows access to regional and EU funding to local firms that have legally hired a number of workers commensurate with the crops produced.

ANTI-TRAFFICKING REVIEW 5 (2015): 89-108

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Policy and Practice



The Role of Trade Unions in Reducing Migrant Workers' Vulnerability to Forced Labour and Human Trafficking in the Greater Mekong Subregion

Eliza Marks and Anna Olsen

Abstract

This paper provides an analysis of what trade unions can offer to reduce the vulnerability of migrant workers to forced labour and human trafficking in the Greater Mekong Subregion (GMS) and Malaysia as a key destination for GMS migrant workers. The exploration of the potential for the engagement of trade union partners is a timely contribution to the forced labour and anti-trafficking debate, given the shift towards a more holistic labour rights approach, and the ensuing search for more actors and partnerships to combat these crimes, which led to adoption of the Protocol of 2014 to the Forced Labour Convention, 1930, (Forced Labour Protocol) in June 2014. Examples from Malaysia and Thailand highlight the role that trade unions can play in policy development and service provision, and also some of the challenges associated with unionisation of a vulnerable, temporary, and often repressed, migrant workforce.

Keywords: International Labour Organization, migrant workers, forced labour, human trafficking, Greater Mekong Subregion, Cambodia, Lao PDR, Thailand, Vietnam, Malaysia, Myanmar, trade unions, labour rights

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Introduction

This paper argues for greater engagement of trade unions as partners in preventing human trafficking and forced labour and empowering workers to avoid these abuses, drawing on the authors' practical engagement with trade union partners in the Greater Mekong Subregion (GMS) and Malaysia. Migrant workers in the region, and across the world, are vulnerable to a spectrum of labour rights abuses—at the extreme end of which are trafficking and forced labour. Generally, anti-trafficking interventions have employed border control and criminal-justice-centric approaches that emphasise prevention, protection and prosecution, and focus overwhelmingly on women, children and sex work. Despite different intentions, this agenda has had the effect of taking away agency from identified victims while leaving others underserved; and diverting attention away from key structural inequities that make migrant workers especially exposed to abuses.

In recent years, acknowledging these shortcomings has resulted in a conceptual, if not practical, shift towards an approach that encompasses a labour rights perspective. This labour rights approach, now embodied in the Protocol of 2014 to the Forced Labour Convention, 1930 (Forced Labour Protocol)¹ opens (or perhaps, reopens) a plethora of new interventions and actors to address trafficking and forced labour, including trade unions. Until recently trade unions had not been considered key actors in the fight to combat trafficking, to the detriment of holistic and effective interventions. When taking a labour rights approach, trade unions seem an obvious partner, however this is less clear in the current GMS context, where those particularly affected are migrant workers. Despite this, and other challenges to the trade union movement in the region, trade unions have proven a key and innovative partner for the International Labour Organization's (ILO) efforts to protect migrant workers from all forms of labour exploitation in the GMS.

Driven by a labour rights outlook, a historical perspective on the trade union movement and drawing from the experiences of the Malaysian Trades Union Congress (MTUC) and the State Enterprises Workers' Relations Confederation (SERC) of Thailand, interviewed in February

¹ In full: ILO, *C029—Forced Labour Convention, 1930 (No. 29), Convention concerning Forced or Compulsory Labour*, 28 June 1930.

2015, this paper assesses what trade unions can offer in the prevention and remedy of forced labour and human trafficking of migrant workers. Authors are situated in the ILO's Tripartite Action to Protect Migrant Workers within and from the Greater Mekong Subregion from Labour Exploitation (GMS TRIANGLE) Project.²

The Nexus Between Labour Migration, Forced Labour and Human Trafficking in the GMS

The GMS comprises countries bound together by the Mekong River. The GMS and neighbouring countries comprise one of the world's most dynamic migration and economic hubs, with major flows from the region into Thailand and Malaysia as key destination countries. There are between two and three million migrant workers in Thailand, and over four million in Malaysia. The Yunnan province of China shares its borders with Lao People's Democratic Republic (Lao PDR), Myanmar and Viet Nam, and has a long history as both a sending and receiving area for internal and international migrants. The number of people from Cambodia, Myanmar, Lao PDR and Viet Nam seeking work abroad continues to rise, matching the demand in destination countries. Economic growth, labour shortages in key sectors, and ageing populations in destination countries drive the need for low-skilled workers in labour-intensive jobs; and lack of jobs, geographical proximity, established migration networks and the profitable recruitment industry match this demand with a steady supply of migrant workers from countries of origin.

The ILO's research³ and practical experience have found that migrant workers in this region are vulnerable to varying labour exploitation

² The GMS TRIANGLE project works in Cambodia, Lao People's Democratic Republic (PDR), Malaysia, Myanmar, Thailand and Viet Nam.

³ The Asia-Pacific region accounts for the highest number of absolute victims of forced labour—11.7 million or 56%, according to the ILO. Globally, the ILO estimates that there are 20.9 million victims of forced labour, and 44% of these (9.1 million) have moved either internally or internationally (ILO, 'ILO Global Estimate of Forced Labour 2012: Results and Methodology', International Labour Office, 2012). See also: ILO Regional Office for Asia and the Pacific, 'Safe Migration Knowledge, Attitudes and Practices in Myanmar', ILO, 2015; GMS TRIANGLE project and Asia Research Center for Migration, 'Employment Practices and Working Conditions in Thailand's Fishing Sector', ILO, 2013; GMS TRIANGLE project and Asia Research Center for Migration, 'Regulating Recruitment of Migration Workers: An assessment complaint mechanisms in Thailand', ILO, 2013;

abuses—vulnerabilities that are heightened for women, ethnic minorities, young workers and those who migrate through irregular channels. Migrants are experiencing the most extreme forms of labour exploitation, including child labour; forced labour (that may involve sexual exploitation); and trafficking.⁴ Migrant workers are frequently employed in sectors where forced labour and trafficking are more likely to occur, including domestic work, entertainment, agriculture, fishing and seafood processing, manufacturing, the service industry and entertainment. There has been a recent increase in public attention on the exploitation of migrant workers in the run up to the 2022 World Cup in Qatar, as trade unions have highlighted abuses within the construction sector.

Towards a Labour Rights Perspective on Trafficking and Forced Labour

Trafficking is defined under the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Trafficking Protocol), adopted by the United Nations (UN) General Assembly as one of the three Palermo Protocols that supplement the 2000 Convention against Transnational Organized Crime. There is a broad and rich literature of critique against the Trafficking Protocol and the national policy responses and non-governmental organisation (NGO) mandates that it has inspired. Criticisms have included the focus on individual criminals and victims, rather than on the structural causes of human trafficking and forced labour. An overt concentration on criminal justice and prosecution has also led to the neglect of the protection and prevention aspects of anti-trafficking interventions. Scholars and commentators have also disapproved of the significant gender bias in anti-trafficking

ILO, 'Profits and Poverty: The economics of forced labour', International Labour Office, 2014, provides a theoretical overview on the determinants of forced labour, and an assessment of determinants of forced labour at the household level and among returned migrants, based on surveys carried out in eight countries. See also report by Verité using ILO methodology: Verité, 'Forced Labor in the Production of Electronic Goods in Malaysia: A Comprehensive study of scope and characteristics', Verité, 2014.

⁴ In 2013 the ILO introduced 'unacceptable forms of work' as one of eight areas of critical importance. Unacceptable forms of work are defined as comprising 'conditions that deny fundamental principles and rights at work, put at risk the lives, health, freedom, human dignity and security of workers or keep households in conditions of poverty.' ILO: 'The Director-General's Programme and Budget proposals for 2014–15', Supplement to Report II to the 102nd International Labour Conference, ILO, Geneva, 2013, para. 49.

interventions, with an observable focus on women and sex work. This has led to inadequate consideration of male trafficking victims' experiences and the industries in which they work, such as construction and fishing.⁵ It has also paradoxically increased the vulnerability of women migrants, as a number of countries have responded to the risks associated with labour migration with placing further restrictions on women's migration.⁶ Critics have also pointed to the sometimes disempowering nature of rescue and rehabilitation programmes for victims, with cases of abuse in women's shelters and limited access to justice well-documented.⁷ These misguided policy responses are a result of trafficking and forced labour being viewed in isolation from the wider context of migration and work. Subsequently, this failure to consider the broader context conceals and even absolves the roles of states and employers in the labour and migration regimes that create conditions for forced labour and trafficking to occur.

These policy failures, and the search for more holistic and empowering approaches, have seen the emergence of the labour rights approach to trafficking and forced labour policy and practice. In recognition of the range and breadth (and arguably, the lack of specificity) of the crime of human trafficking, the scope of anti-trafficking efforts has broadened.⁸ The labour rights approach views trafficking within the broader context of migration and work. Conceptually, it broadens the scope of the discussion beyond 'sex trafficking', and victim stereotypes; and practically, it strengthens the advocacy landscape to introduce new actors and

⁵ The United Nations Office on Drugs and Crime (UNODC) 'Global Report on Trafficking in Persons', UNODC, 2009, identifies 18% of victims as being trafficked for forced labour and 79% for sexual exploitation, and suggests that this may be the result of statistical bias, as labour exploitation and male victims are less visible and relatively under-detected. In 2011, UNODC reported that trafficking for sexual exploitation had shrunk to 53%, and trafficking for forced labour and grown to 40%, acknowledging that 'the increasing detections of trafficking for forced labour has been a significant trend in recent years.' (UNODC, 'Global Report on Trafficking in Persons', UNODC, 2014).

⁶ Bans on sending nationals abroad to work as domestic workers have been imposed by Indonesia (in 2009; and planned again in 2015) and Cambodia (in 2011), and in August 2013, Nepal announced a ban on women under the age of 30 from migrating for domestic work to the Arab Gulf States.

⁷ A T Gallagher and E Pearson, 'The High Cost of Freedom: A Legal and Policy Analysis of Shelter Detention for Victims of Trafficking', *Human Rights Quarterly*, vol. 32, 2010; Global Alliance Against Traffic in Women (GAATW), 'Collateral Damage: The impact of anti-trafficking measures on human rights around the world' GAATW, 2007.

⁸ International Organization for Migration (IOM), Regional Office for Southeast Asia, 'Situation Report on International Migration in East and South-East Asia', IOM, 2008, p. 114.

advocates⁹ including employers' organisations and trade unions. A labour paradigm shifts the discussion from sex work, 'powerless victims' and 'wicked traffickers', to look at the more subtle, insidious and non-violent forms of exploitation, including work permits tied to specific employers or industries in destination countries; insurmountable recruitment fees that contribute to situations of debt bondage and forced labour; complicated and expensive immigration regimes that contribute to irregular movement; and state-sanctioned restrictions on access to social protection, freedom of association and the right to collective bargaining for migrant workers. In acknowledging that some immigration regimes inadvertently *create* trafficking victims, forced labourers and undocumented migrants, the labour paradigm places the focus back on immigration and employment policies that leave certain occupations and sectors unregulated and outside the ambit of labour protection laws.¹⁰

The importance of an approach that addresses labour and migration structures, focuses on prevention and protection and emphasises multi-stakeholder collaboration was recognised by the international community through the adoption of the Forced Labour Protocol. The Protocol requires governments to take measures to prevent and eliminate the use of forced labour, to provide protection to victims and access to appropriate and effective remedies, such as compensation, and to sanction the perpetrators of forced labour. It guides states to include employers' and workers' organisations in the development and implementation of national policies and action plans. The Protocol and its accompanying Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203) also outline specific measures to protect migrant workers, including protection from fraudulent and abusive recruitment practices. The Recommendation also cites the promotion of freedom of association and collective bargaining to enable at-risk workers to join workers' organisations as a preventative measure, and recognises the role and capacities of workers' organisations to support and assist victims of forced labour.

⁹ J Chuang, p. 81

¹⁰ B Anderson and R Andrijasevic, 'Sex, Slaves and Citizens: The politics of anti-trafficking', *Soundings*, vol. 40, 2008, pp. 141–2.

Along with a range of other researchers and advocates, the ILO has aimed to support and encourage its constituents, including employers' organisations, workers' organisations, government and civil society organisations (CSOs) in the GMS to increasingly adopt the labour rights approach to human trafficking.

Challenges to Trade Union Engagement with Migrant Workers in the GMS

The trade union movement emphasises solidarity with workers' rights in social and economic concerns, and holds freedom of association and the right to collective bargaining as the main avenues for improving working conditions and increasing workers' share of the profits they help to create.¹¹ Unions are established to give voice to workers, to provide a channel for discussion with employers and government, and to promote the best interests of workers. One of the most effective ways of preventing the exploitation of migrant workers is by guaranteeing the right to join trade unions in destination countries; in industries with strong trade union representation there are lower levels of labour exploitation, child labour, trafficking and forced labour.¹² Despite the trend of increasingly considering the broader labour and migration aspects of trafficking and forced labour, for many prominent anti-trafficking activists and organisations this shift has yet to translate into meaningful engagement with, recognition of, and advocacy for an expanded role of trade unions in anti-trafficking programmes.¹³

There are a number of reasons for the absence of trade union interventions in migrant labour and anti-trafficking efforts. At the conceptual level, there is a schism between the literature on labour migration and the literature on organised labour. Literature on labour migration primarily relates to disciplines of demography, geography and

¹¹ H Shamir, 'A Labor Paradigm for Human Trafficking', *UCLA Law Review*, vol. 60, no. 1, 2012, p. 95.

¹² A T Gallagher, *The International Law of Human Trafficking*, Cambridge University Press, New York, 2012, p. 439 ; J Beirnaert, 'A Trade Union Perspective on Combating Trafficking and Forced Labour in Europe' in C Rijken (ed.), *Combating Trafficking in Human Beings for Labour Exploitation*, Wolf Legal Publishers, The Netherlands, 2011, p. 483.

¹³ H Shamir, p. 127; J Chuang, p. 32 ; N Piper and J Grugel, *Critical Perspectives on Global Governance: Rights and regulation in governing regimes*, Routledge, Oxon, 2007, p. 74.

development studies, and has tended not to engage on issues of the position of migrant workers in relation to industrial relations systems, whereas literature on organised labour has generally ignored the increasing significance of temporary migrant labourers, and the role of non-union entities in organising these workers.¹⁴ Migrant workers' right to join and lead trade unions is frequently denied in the GMS, either by the law of the destination country, the employment contract or immigration status. Migrant workers are largely employed in informal, hard-to-reach sectors, including in rural areas, on fishing vessels, or in private homes.¹⁵ Migrant workers tend to have long and irregular working hours and may not be able to leave the workplace to seek help or join union activities. Frequently they face cultural and communication barriers, including language. Thus the factors that result in high incidence or risk of forced labour and trafficking in certain occupations are the same factors that lead to these sectors often having the lowest trade union density. Migrants in the GMS region are also often transitory and temporary—making investment in a union, for both the worker (with respect to payment of dues) and the union, seem problematic and untenable.

Reliable, comparable statistics on trade union density rates in the region are poor. The ILO suggests that in 2010, union membership (as a percentage of total employment) in Lao PDR was approximately 15.5%;¹⁶ 16% in Viet Nam; 8% in Malaysia; and 3% in Thailand.¹⁷ The higher rates in Lao PDR and Viet Nam can be attributed to the fact that these are socialist countries in which unions are state bodies. Rates of migrant unionisation in these countries is not officially measured.

Further challenges stem from current practices of trade unions. While historically trade union movements have been responsive to, and indeed driven by, the needs of migrant workers,¹⁸ this became less true as the nation state became more focused on serving individuals through the

¹⁴ M Ford, 'Organizing the Unorganizable: Unions, NGOs, and Indonesian migrant labour', *International Migration*, vol. 42, no. 5, 2004, p. 101.

¹⁵ M Ford, 'Migrant Labor NGOs and Trade Unions: A partnership in progress?', *Asian and Pacific Migration Journal*, vol. 15, no. 3, 2006, pp. 304–5.

¹⁶ ILO, 'Trade union density rate by sex—as a percent of total employment (%)', available at ILO STAT, retrieved 2 August 2015, www.ilo.org/ilostat

¹⁷ S Hayter, forthcoming; 'ILO Statistics on Trade Unions and Collective Bargaining', in ILO, 'World of Work Report: Development with jobs', ILO, 2014, p. 92.

¹⁸ See especially the histories of unionisation in the plantation sector in Malaysia, and examples from Singapore, Fiji and Australia.

lens of citizenship. Further, as global migration increased, rhetoric reframed migration as a problem to be managed, rather than acknowledging migrant workers as key participants in the workforce and noting their contribution to productivity. As this anti-migration stance gained momentum in the postcolonial era, some trade unions excluded migrant workers due to the real or perceived preconception that migrant workers have a negative effect on the availability of jobs and bargaining power of local workers.¹⁹ Some unions began to consider nationality as crucial to membership, rather than the shared struggle of all workers of all nationalities.²⁰

Funding structures and mandates of unions may also place limitations on how resources are allocated, especially if unions are quasi-state institutions. In the GMS region, noting the role of trade unions in ex-Communist states like Lao PDR and Viet Nam, trade unions have traditionally taken this nationalist, protectionist stance. Migrant worker concerns have been seen as beyond the scope of unions' responsibility and capacity. There remain questions in former communist states about whether citizens can join trade unions in other countries. Given the political space occupied by unions in these countries, states need to ensure that their laws enable migrant workers to join trade unions in destination countries and that this action does not risk their membership of the state union. States further need to encourage that migrant workers join unions in destination countries, allowing these workers to reflect the core values of the country of origin. It is further worth noting the divergent, highly politicised spaces that trade unions occupy within the region, where trade union membership in some countries is a dangerous statement of political opposition.

While some progressive unions drove the discourse on migrant workers forward in the 1950s and 60s, little traction (except with the ILO through the constituent voice of these unions) in improving the protections and conditions for migrant workers across the region was achieved. While these progressive unions encouraged engagement with migrant worker

¹⁹ N Piper, 'Social Development, Transnational Migration and the Political Organising of Foreign Workers', Contribution to the Committee on Migrant Workers, Day of General Discussion on the theme of 'Protecting the rights of all migrant workers as a tool to enhance development, Office of the United Nations High Commissioner for Human Rights, 2005.

²⁰ M Ford, 'Migrant Labor NGOs', p. 304.

populations, efforts were often thwarted by restrictive legislation. For example, despite notable efforts by the (then) Federation of Trade Unions of Burma and the (then) Seafarers' Union of Burma in exile, working with the State Enterprises Workers' Relations Confederation (SERC), Thai trade unions have still faced challenges in adequately representing the voices of migrant workers from Myanmar and the voices of other minority migrant worker populations. While union efforts in certain sectors have been more successful than others (sectors such as fishing and port work that by their nature operate across borders, and sectors with strong historical engagement with migrant workers seem to have achieved greater migrant worker engagement), many trade unions appear absorbed with national concerns and less willing to engage with more challenging issues around migrant work, especially where trade unions do not enjoy public support. It is further noted that trade unions do not have significant presence in some sectors dominated by migrant women, including sex work and domestic work sectors.

However in recent years, with the emergence of the labour rights approach and, in part, working through the ILO's tripartite structure, trade unions in the region have dramatically increased their engagement with migrant workers, arguably once again, internationalising the shared needs and challenges facing workers worldwide. Unions have proven flexible, innovative and effective partners in protecting migrant workers from falling victim to forced labour and human trafficking, and providing legal and support services to remedy these crimes.

What can Trade Unions Bring to the Anti-Trafficking Movement?

Trade unions bring significant advantages to the anti-trafficking and forced labour movements. Progressive anti-trafficking interventions have pointed to the empowering nature of unions' approach, through facilitating negotiations and lobbying for improved conditions. In doing so, they take a systematic rather than individual perspective to the issues. Formalised tripartite structures for workers' (and employers') organisations allow unions to closely cooperate at the policy level. In the GMS region, trade unions have increasing legitimacy and voice with governments in countries where there is a fear that the civil society space is shrinking (Cambodia, Malaysia and Thailand) or is historically restricted (Lao PDR, Myanmar and Viet Nam). Unions also have strong connections with affiliates globally, providing a large network of partners for cooperative efforts and shared information. Trade unions also

Table 1: Key trade unions and workers' organisations in the GMS region (plus Malaysia)

Country	
Cambodia	Cambodian Confederation of Trade Unions (CCTU) Cambodian Labour Confederation (CLC) National Union Alliance Chamber of Cambodia (NACC)
China	All-China Federation of Trade Unions (ACFTU)
Lao PDR	Lao Federation of Trade Unions (LFTU)
Malaysia	Malaysian Trades Union Congress (MTUC)
Myanmar	Agriculture and Farmers Federation of Myanmar (AFFM) Myanmar Trade Unions Federation (MTUF) Myanmar Maritime Trade Unions (Formerly Seafarers' Union of Burma) Confederation of Trade Unions of Myanmar (CTUM)
Thailand	Labour Congress of Thailand (LCT) National Congress of Private Industrial Employees (NCPE) State Enterprises Workers' Relations Confederation (SERC) Thai Labour Solidarity Committee (TLSC) Thai Trade Union Congress (TTUC)
Viet Nam	Viet Nam General Confederation of Labour (VGCL) Vietnam Women's Union (VWU)

have strong representational legitimacy, due to membership structure and international affiliations.

Within the framework of the GMS TRIANGLE project, trade unions have been reaching out to migrant workers to provide information and support services; organising migrant workers into unions or worker associations; providing case management and legal support; and contributing to the development of legislation to better protect all workers. Much of this work has been driven by the trade union manual 'In Search of Decent Rights: Migrant Workers' Rights' that was published

by the International Labour Office (the permanent secretariat of the ILO) in 2008, developed in partnership with the Bureau for Workers' Activities (ACTRAV), the International Trade Union Confederation, global union federations and national unions.²¹ This manual, on which trade union action plans in the GMS countries and Malaysia were based, calls for union action to address migrant worker issues on four pillars: promoting a rights-based migration policy; creating alliances with trade unions in other countries; educating and informing union members; and reaching out to migrant workers.

In Cambodia, Lao PDR, Malaysia, Myanmar and Thailand, trade unions are running Migrant Worker Resource Centres (MRCs), delivering safe migration training and generally acting as a trusted information source for migrant workers and their families before departure, within the destination country, and upon return. In countries of origin, trade unions have an important role to play in facilitating complaints processes and addressing recruitment agency malpractice. In a recent case in Myanmar, workers who were charged exorbitant fees by a local recruitment agency sought support from the Confederation of Trade Unions Myanmar (CTUM). CTUM coordinated with the anti-trafficking police and the Complaints Centre of the Migration Department in the Ministry of Labour; and while the case is ongoing, the recruitment agency was forced to give a refund to the complainants.

Trade unions have also demonstrated their ability to work collaboratively with other unions and NGOs. In Cambodia, the Cambodian Confederation of Trade Unions (CCTU), the Cambodia Labour Confederation (CLC), and the National Union Alliance Chamber of Cambodia (NACC) have formed the Cambodia Trade Union Committee on Migration (CTUC-M) as an informal network to share information and put forward areas of common concern. This group made contributions to the Technical Working Group tasked with drafting eight *prakas* (ministerial orders) supporting Sub Decree 190 on the Management of Sending Cambodian Workers Abroad through Private Recruitment Agencies; and also facilitated the signing of the Memorandum of Understanding between Trade Unions in Cambodia and Trade Unions in Thailand on Protection of Migrant Workers' Rights in 2013.

²¹ ILO, 'In Search of Decent Rights, Migrant Workers Rights', International Labour Office, 2008, retrieved 2 August 2015, http://www.ilo.org/wcmsp5/groups/public/—ed_dialogue/—actrav/documents/publication/wcms_115035.pdf

Trade unions in the region are also working towards significant bilateral cooperation, with Memoranda of Understanding signed between trade unions in the important migration corridors between Cambodia and Thailand; Lao PDR and Thailand; and Viet Nam and Malaysia. A further area of collaboration is between NGOs and trade unions. In Thailand's fishing sector, the Foundation for AIDS Rights (FAR) and the Eastern Trade Union are working together to improve organising of people working in the fishing industry. Through this broad scope of actions, trade unions in the region are increasingly able to successfully represent the rights and interests of migrant workers at the enterprise level, in the community and in policy dialogue.

A Case Study from Malaysia: The Malaysian Trades Union Congress Experience

Migrant workers' vulnerability to human trafficking and forced labour in Malaysia has been noted multiple times by the ILO Committee on Experts on the Application of Conventions and Recommendations (CEACR).²² While nationals and migrant workers are guaranteed equal protection under Malaysian law, in practice, migrant workers are frequently subject to rights violations and are unlikely to report violations to the authorities, largely due to fear of losing their jobs or the threat of deportation. The conditions of migrants' work permits restrict them from changing their employer—forcing many migrant workers to remain in forced labour conditions or face falling into irregular immigration status. Employers may also curtail workers' freedom of movement by withholding identity documents with the aim of preventing them from absconding. Migrant workers have the right to join trade unions under the Trade Union Act, but often this right is violated through explicit prohibitions in workers' employment contracts.

MTUC²³ was compelled to begin working with migrant workers over ten years ago, as migrant workers began to approach the union to seek

²² Most recently in 2015, see ILO, 'Application of International Labour Standards 2015 (I)', Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), International Labour Office, 2015, p. 164.

²³ The MTUC is a federation of trade unions and registered under the Societies Act (1955). It is the oldest national organisation representing Malaysian workers. Unions affiliated to MTUC represent all major industries and sectors with approximately 500,000 members. The MTUC has been recognised as the representative of workers in Malaysia and is consulted by government on major changes in labour laws through the National Joint Labour Advisory Council. MTUC also represents Malaysian workers at the International Labour Conference.

advice and explore the benefits of union membership. In a recent interview, Florida Sandanasamy, Migrant Workers Project Coordinator at MTUC,²⁴ said the general MTUC belief is that the key benefit trade unions can bring to the anti-trafficking and forced labour agenda is to create a forum for dialogue and negotiation with employers, as well as the possibility of collective bargaining. Sandanasamy states that patterns of abuses against migrant workers arise when the worker does not have the ability to air their grievances with their employer. The MTUC does not differentiate between migrant workers and local workers in their activities—noting the negative impact that sidelining migrant workers would have on the working population as a whole.

The unionisation of migrant workers is a key strategy of MTUC—and a significant and constant struggle. Sandanasamy states that it can take between five and seven years to achieve official government recognition of a new trade union. MTUC affiliates have faced legal challenges to its organising activities; union-busting activities, intimidation and deportation of union leaders, and challenging of secret ballot outcomes have all been observed. Several, long-running cases have gone to the Industrial Relations Department and the High Court of Malaysia to adjudicate whether employers have illegally interfered with a fair voting process. Recognising the unique challenges in organising labour, much less migrant labour, MTUC has developed guidance and strategies on the organisation of migrant workers. For example, certain MTUC affiliates have introduced strategies including waiving membership dues until a collective bargaining agreement has been signed at the members' workplace, as a means of encouraging migrants to join the union, particularly if workers are warned of a threat of dismissal for joining a union. Despite these challenges, MTUC affiliates have achieved some successes in organising migrant workers at a number of enterprises throughout the country. For example, in Penang, at an electronics manufacturing company in which the majority of employees are migrants, MTUC helped to organise 500 workers to join the Electronics Union.

The MTUC has also been active in pursuing complaints against companies for labour rights abuses such as unpaid wages, no rest days, inadequate accommodation, unfair dismissal, medical insurance issues, lack of

²⁴ Interview over Skype, February 2015.

compensation for injury and the withholding of identity documents. Between September 2011 and December 2014, MTUC was successful in receiving awards of over USD 65,300 in compensation for migrant workers. This was achieved through action in labour courts, industrial relations courts and through direct negotiations. MTUC also works with trade union partners in migrants' countries of origin—aiming to reduce the vulnerability to human trafficking and labour exploitation before departure. In Viet Nam and Nepal, MTUC is developing partnerships with the Vietnam General Confederation of Labour (VGCL) and the General Federation of Nepalese Trade Unions (GEFONT). A Memorandum of Understanding between MTUC and VGCL was signed in 2015, and MTUC has also developed a union 'internship programme', where a union representative from the origin country will work with MTUC in Malaysia, boosting union workers' skills and bilateral partnerships. This type of cross-border collaboration enhances the opportunity for end-to-end (from pre-departure to return and reintegration) support services and strengthens the trade union movement in the region.

In attempting to organise domestic workers, MTUC has faced numerous challenges. A proposal to officially register a group of domestic workers has failed twice—with no sufficient reason offered. MTUC is reluctant to instead establish an informal organisation, as this will weaken the scope and impact of their actions and further differentiates between domestic workers and other workers.

A Case Study from Thailand

The 2014 Observations on the Forced Labour Convention reported by the ILO CEACR expressed concern over the vulnerability of migrant workers to forced labour in Thailand, making special note of the experiences of irregular migrant workers during the Nationality Verification (NV) process, and of conditions in the fishing sector.²⁵ In Thailand, the Labour Protection Act B.E. 2541 (1998) applies to all workers, regardless of nationality or legal status. However, the Act does not fully extend to many of the industries in which forced labour practices

²⁵ ILO, 'Application of International Labour Standards 2014 (I)', Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), ILO, 2014, p. 160.

and human trafficking are most common, including agriculture, sea fisheries work and domestic work.²⁶ Migrant workers often earn less than the minimum wage, and are subjected to illegal wage deductions, excessive working hours and poor living and working conditions. While migrant workers can legally join Thai unions, they frequently work in jobs or regions that are not traditionally unionised. Moreover, the Labour Relations Act B.E. 2518 (1975) states that only Thai nationals can serve as union leaders and committee members, thus prohibiting migrants' active involvement in existing unions or establishment of their own trade union to serve their needs.

SERC²⁷ began to work on migrant worker issues over fifteen years ago, in collaboration with the Thai Labour Solidarity Committee (TLSC) and NGOs. Sawit Kaewvarn, SERC's General Secretary,²⁸ states that it was their NGO partners who drew unions into the debate, recognising the legitimacy of trade unions' voice among employers' groups and the government. Kaewvarn states that there were initially many challenges in garnering support from SERC affiliates to begin work on migrant worker issues—citing negative perceptions towards migrant workers, and concerns that better rights would encourage migrant workers to remain permanently, as the key reasons.

SERC and TLSC have been active in lobbying for greater protection of migrant workers—both before departure and while at work in Thailand. The two trade unions have collaborated in investigation of recruitment practices and working conditions at specific Thai enterprises, by interviewing workers who were previously employed at factories. The findings were used to make recommendations to both the enterprises and the Thai government, and to lobby for legislative reform.

SERC has also taken its advocacy for migrant workers' rights to the international arena. In September 2011, SERC made a submission of a petition to the ILO's CEACR regarding the Thai government's policy to

²⁶ In 2012, Thailand issued Ministerial Regulation No. 14 on domestic work to the Labour Protection Law providing some protections including annual holidays and one day off a week for domestic workers but failing to regulate working hours and pay. Ministerial Regulation No. 10 on work in fishing (2015) includes a minimum age of 18 years and requires regular rest hours and written contracts for all workers.

²⁷ SERC was formed by eight public enterprise-based unions in 1980. Currently, SERC has fifty-two member unions from both private sectors and public enterprises throughout Thailand.

²⁸ Interviewed in Bangkok, Thailand, in February 2015.

deny migrant workers access to the Social Security Office's Workmen's Compensation Fund. The submission argued that this was in contravention of the Equality of Treatment (Accident Compensation) Convention,²⁹ which Thailand has ratified.³⁰ This engagement signals the naissance of a trade union movement in Thailand that will be better able to combat trafficking and forced labour from within workplaces.

Conclusion

The efforts and initiatives above demonstrate the continuing shift towards a labour rights approach, under which the role of trade unions in preventing and responding to trafficking and forced labour is increasingly prevalent. Trade unions have the unique knowledge, representational legitimacy, and capacity to deal with these concerns. When supported, as activities in the GMS region demonstrate, they can form part of a multi-stakeholder response to the issue.

There are however, several areas in which unions can expand their work to become more effective and proactive in the fight against forced labour and trafficking of migrants. Origin and destination country unions must continue bilateral cooperation, creating the opportunity for end-to-end services. There is also room for unions to expand their activities in the realm of return and reintegration, for example through sector-specific trade unions supporting skills recognition and job placement. More effort needs to be made to reach the most vulnerable groups of workers, such as fishers with transient workplaces, and domestic workers with workplaces in private homes. In efforts to expand opportunities for unionisation, the emergence of initiatives to encourage flexible and sustainable unionisation for migrant workers, such as the option for

²⁹ In full: ILO, *C019—Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19) Convention concerning Equality of Treatment for National and Foreign Workers as regards Workmen's Compensation for Accidents*, 5 June 1925.

³⁰ Following the submission by SERC, the ILO Committee of Experts on the Application of Conventions and Recommendations adopted several observations expressing 'deep concern over the situation', and requested explanation, legislative review and improved implementation. These requests were left unanswered by the Thai government in 2012 and 2013, before a report was submitted in 2014. The report outlined plans to conduct research into the possibility for a social insurance scheme for inbound and outbound migrant workers (B Harkins, 'Social Protection for Migrant Workers in Thailand' in United Nations Thematic Working Group on Migration in Thailand, 'Thailand Migration Report 2014', United Nations Thematic Working Group on Migration in Thailand, 2014).

portable union membership through sector-based unions or union partnerships, is becoming evident.

Engaging in the concerns of forced labour and human trafficking is not only beneficial to those at risk, but arguably essential for the trade union movement. Unionising the ‘unorganisable’ is seen as a key part of ensuring the future relevance of trade unions in the face of globalisation and the worldwide decrease in union membership. When migrant workers and survivors of trafficking and forced labour are trained and supported to be advocates, they bring a critical new vitality to the trade union movement fighting for vulnerable workers’ rights in the region as a whole. The trade union movement is well-placed to capitalise on work with anti-trafficking actors, the increasing numbers of migrant workers within the global care economy and rising consumer awareness of goods produced by migrant workers to reinvigorate the movement in the GMS region.

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Claiming Space for Labour Rights within the United Kingdom Modern Slavery Crusade

Caroline Robinson

Abstract

The focus of this article is on advocacy opportunities provided by the anti-trafficking framework in a new political climate. Through the case study of the United Kingdom (UK) Modern Slavery Act 2015 deliberations the article explores opportunities to use political interest in human trafficking to advocate labour rights and protections for vulnerable workers. The article explores how, largely cynical, political motivations for the debate on ‘modern slavery’ in the UK, provided an opportunity to reframe the anti-trafficking discourse in this context. Whilst migration control and labour market deregulation are key priorities for the UK government, the Modern Slavery Act process enabled advocates to highlight the impact of such measures on vulnerable, predominantly migrant, workers. It also ultimately served to persuade decision makers to make a connection between widespread labour abuses and severe labour exploitation. Through this case study the article argues for engagement with anti-trafficking frameworks to both highlight and harness the political rhetoric, and maximise the space provided for promoting the rights of vulnerable workers.

Keywords: UK, modern slavery, labour exploitation, immigration, labour inspection, policy advocacy

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Introduction

The global debate on human trafficking has largely been dominated by sex.¹ Responses to trafficking for sexual exploitation have the power to polarise moral opinion to such an extent that the Trafficking Protocol² negotiations in the late 1990s were reportedly dominated by angry exchanges and eventual gridlock about prostitution's place in the treaty.³ However, the process to review and revise the United Kingdom's (UK) anti-trafficking law and policy framework from 2013–15 has taken a different course. Here moral opinion on sexual exploitation has been overtaken by a less muddled moral narrative recalling the UK's role in the abolition of the transatlantic slave trade. This article discusses how the Modern Slavery Act 2015 process⁴ and this moral narrative have been used by politicians to offset the impact of their own morally questionable responses to immigration and labour market regulation.

In this article I will look at the motivations behind the UK government proposing concurrent legislation that on one hand sought to create gaps in protections for migrants and low-skilled workers and on the other sought to support those who are severely exploited as a result of such gaps. I will discuss how this contradictory policy juxtaposition provided an opportunity for organisations like my own, Focus on Labour Exploitation (FLEX), to reframe the debate on trafficking through the Modern Slavery Act. I will use the example of the Modern Slavery Act debate on the role of the Gangmasters' Licensing Authority (GLA), a labour provider licensing body established to prevent labour abuses, to demonstrate how it served as a conduit for discussion on the connection between migration control, labour market deregulation and labour

¹ See for example: the work of N Kristoff in the *New York Times*, retrieved 6 August 2015, <http://www.nytimes.com/column/nicholas-kristof> and at Half the Sky Movement, retrieved 14 May 2015, www.halftheskymovement.org; J Chuang, 'Rescuing Trafficking from Ideological Capture: Prostitution reform and anti-trafficking law and policy', *University of Pennsylvania Law Review*, vol. 158, issue 6, 2010, p. 1655; E Bruch, 'Models Wanted: The Search for an Effective Response to human trafficking', *Stanford Journal of International Law*, vol. 40, issue 1, 2004, pp. 1–45.

² In full: 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).

³ A T Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A preliminary analysis', *Human Rights Quarterly*, vol. 23, 2001, retrieved 25 February 2015, <http://traffickingroundtable.org/wp-content/uploads/2012/07/Human-Rights-and-the-New-UN-Protocols.pdf>

⁴ This article was drafted two weeks prior to the Modern Slavery Bill's enactment into law.

exploitation. I will conclude by addressing the implications of the UK experience for future advocacy in the sphere of trafficking for labour exploitation.

Focus on Sexual Exploitation in Anti-Trafficking Responses

From Cambodia to India, Argentina to the United States of America, anti-trafficking legislation has caused debate, fighting and often stalemate among those who support sex work as work and those who believe it to be inherently exploitative. Indeed many sex workers' rights activists have come to despise all interest in combating 'trafficking' as they view such interest as a covert means of attacking sex work. In the UK, however, the debate in relation to the Modern Slavery Act has taken a different direction, away from questions relating to sexual exploitation. The narrative has shifted from the morality of selling sex to that of abusing labour for profit—all labour in all sectors—a major departure from many anti-trafficking debates. Addressing non-governmental organisations (NGOs) on the Modern Slavery Bill's contents at the Human Trafficking Foundation forum in December 2013, the then Security Minister James Brokenshire, expressly ruled out consideration of prostitution within the Bill due to time constraints. In the interests of ensuring safe passage of their Bill through Parliament before the May 2015 general election, the government sought to draw on a more black-and-white moral narrative. The spirit of William Wilberforce and his crusade against the transatlantic slave trade from his seat in the UK parliament was regularly invoked, making non-sexual 'slavery' the narrative focus, and therefore largely side stepping polarising debate on agency in sex work.

Immigration

With the UK General Election set to take place in May 2015, the governing party, the Conservatives, were aware that immigration could sway the vote. Figures on net migration had seen a 'statistically significant increase' to 298,000,⁵ contrary to the Conservatives' 2010 election pledge to reduce

⁵ Office for National Statistics (ONS), 'Migration Statistics Quarterly Report, February 2015', ONS, 2015, retrieved 26 February 2015, <http://www.ons.gov.uk/ons/rel/migration1/migration-statistics-quarterly-report/february-2015/index.html>

levels of net migration to below 100,000. The Conservatives were also threatened by a growing populist political movement, led by a minority party, the UK Independence Party (UKIP). UKIP links unemployment, low pay and reduced funding for public services to the pressures placed on the UK by immigration from EU Member States. In order to counter this threat, the Conservatives championed government measures that sought to reduce opportunities for migrants to access the British welfare system and to increase barriers to undocumented migrants accessing services. The proposed Modern Slavery Bill, steeped in associations with William Wilberforce and Britain's role in 'extinguishing the new slavery just as it did the old',⁶ was partly designed to soften the blow for a core section of its electorate, namely Anglican church goers,⁷ of the anti-immigration agenda.

The Modern Slavery Bill's announcement coincided neatly with the introduction of the Immigration Bill to the Houses of Parliament. This Bill, now Immigration Act 2014, explicitly aimed to 'make the UK the least attractive destination for illegal [sic] migrants'⁸ through measures to limit migrant access to public services. The introduction of the Modern Slavery Bill, to help the victims of hostile migration measures, successfully rallied support from both the Anglican and Catholic churches. This move headed off those who might accuse the Conservatives of regressing to the 'nasty party', a term coined by the then Chair, now Home Secretary, Theresa May in 2002, recognising the party's need to detoxify their image. When May made tackling 'modern slavery' a 'personal priority' in 2013⁹ she was keenly aware of the importance of her anti-slavery crusade to her party's electoral success.

The opposition Labour Party also found labour exploitation to be a useful means of addressing the difficult politics of immigration. Delivering a key speech on immigration in 2012, the Labour leader Ed

⁶ F Nelson, 'William Wilberforce's heirs are ready to tackle the great evil of the age', *The Telegraph*, 22 August 2013.

⁷ B Clements and N Spencer, 'Voting and Values in Britain: Does religion count?', Theos, 2014, retrieved 28 January 2015, <http://www.theosthinktank.co.uk/files/files/Reports/Voting%20and%20Values%20in%20Britain%202012.pdf>

⁸ Home Office, 'Immigration Bill Factsheet: Overview of the Bill', Home Office, 2013, p.3, retrieved 28 January 2015, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249251/Overview_Immigration_Bill_Factsheet.pdf

⁹ Press Association, 'Theresa May makes modern slavery her "personal priority"', *The Guardian*, 24 November 2013.

Miliband detailed mistakes he felt his party had made when in government: an unrestricted flow of immigration from the European Union, weak labour standards and a ‘short-term, low skill approach’ from business.¹⁰ In the speech, Miliband spoke of the need to expand the remit of the GLA. The Labour Party was striving to address British people’s growing concerns about immigration whilst ensuring that their core trade union support and socialist wing did not see it as evidence of a shift to the right. In April 2014, Labour Shadow Home Secretary Yvette Cooper, in a speech on immigration, launched a consultation in to ‘the laws around exploitation and the undercutting of wages and jobs.’¹¹ Labour’s position on immigration has become tied to its position on labour exploitation: too many low-skilled migrant workers is bad both for migrant workers who are being exploited, and for British workers who are having their wages undercut.

Deregulation

In addition to toughening conditions for undocumented migrants in the UK, the Coalition government also implemented significant reforms to the way in which the labour market is regulated, with implications for the low-skilled workforce. The government’s ‘Red Tape Challenge’ set out to reduce the regulatory burden on UK business, and culminated in the publication of a Deregulation Bill in July 2013. Its provisions included changes to rules governing health and safety for self-employed workers as well as curtailing the powers of employment tribunals and the main UK labour inspection authorities. Many of the so-called bureaucratic measures to be cut had an impact on protections for workers. In this context, the Modern Slavery Bill offered the government a safe space to talk about severe labour abuses being faced by some workers, without addressing some of the wider impact of deregulation or migration reform on workers at the bottom of the labour market.

¹⁰ E Miliband, ‘Ed Miliband’s Immigration Speech in Full’, politics.co.uk, 2012, retrieved 29 January 2015, <http://www.politics.co.uk/comment-analysis/2012/06/22/ed-miliband-s-immigration-speech-in-full>

¹¹ Y Cooper, ‘Labour’s Approach to Immigration—Speech by Yvette Cooper MP’, Labour Party, 2014, retrieved 31 January 2015, <http://press.labour.org.uk/post/82276714334/labours-approach-to-immigration-speech-by>

The Modern Slavery Act

The Labour and Conservative Party positions on immigration and the labour market, whilst distinct, share a need for a sweetener for important sections of both their core base and potential electorate. For the Modern Slavery Bill to provide this it had to incorporate consideration of labour exploitation across all sectors, something that is often excluded in anti-trafficking debate. Indeed, when I asked the Home Secretary at the launch of the Bill whether prevention of trafficking for labour exploitation would be considered in the proposed legislation she said that it was a key priority for the government and that the role of the GLA would be under review as a core part of this agenda. Whilst politicians are skilled at offering appeasing responses, within five months of the Bill launch meeting the GLA had been moved from the Department for Environment, Food and Rural Affairs to the Home Office, opening the door for its expansion into non-agricultural sectors. Announcing this major change, the government said the move would help ‘stop practices which exploit vulnerable workers and undercut local businesses that play by the rules’.¹² This announcement made clear that rhetoric on labour exploitation would play a major part in the modern slavery crusade. The danger was that the language of labour exploitation would be used to target migrants and to pursue serious organised criminal networks rather than to enforce labour rights.

A Modern Slavery Bill supported by all parties, to be rapidly enacted before the May 2015 general election made good political sense. Early on, NGOs were told by those enforcing the Bill for the government that due to the short timeframe, importance and urgency of the issue, few amendments should be sought. This is not unusual in the anti-trafficking world, as the Global Alliance Against Traffic in Women (GAATW) has shown,¹³ time and again responses to human trafficking are often misguided precisely because of their act-first-think-later nature. In the UK context, acting first meant ignoring the mismatches beneath the surface

¹² UK Government, ‘Tougher Enforcement Action and Stronger Penalties for Unscrupulous Employers’, 2014, retrieved 31 January 2015, <https://www.gov.uk/government/news/tougher-enforcement-action-and-stronger-penalties-for-unscrupulous-employers>

¹³ GAATW, ‘Collateral Damage: The impact of anti-trafficking measures on human rights around the world’, GAATW, 2007.

of the government's immigration, red tape cutting and modern slavery agendas. Yet while some suggested 'any bill on slavery is better than no bill',¹⁴ many politicians, lawyers and NGOs, including FLEX, were outspoken in their objection to the draft Modern Slavery Bill. Indeed, in a *Guardian* newspaper article published following the release of the Draft Bill, Claire Falconer and I highlighted many key gaps in the Bill, which we argued lacked 'prevention measures required to root out exploitation in high-risk labour sectors' as well as any victim protection or support provisions.¹⁵

A Focus on Labour Exploitation in the Modern Slavery Act

Forced labour and trafficking for labour exploitation were pushed to the fore during the Modern Slavery Bill¹⁶ pre-legislative scrutiny, parliamentary debate and amendments. The key opportunities to amend the Modern Slavery Act as it passed through Parliament were at Committee and Report Stages, first in the House of Commons and then in the House of Lords. Opposition amendments on labour exploitation and forced-labour-related issues were tabled at all stages,

¹⁴ Comments made by Baroness Butler-Sloss at the Human Trafficking Foundation Forum meeting, 9 December 2013.

¹⁵ C Robinson and C Falconer, 'Theresa May's Modern Slavery Bill will fail to provide protection to victims', *The Guardian*, 20 December 2013.

¹⁶ This Bill was drafted by the UK government in 2013, it then underwent a process of 'pre-legislative scrutiny', which consisted of submission of oral and written evidence from interested parties on the Bill's contents to a committee of Members of Parliament (MPs) from both the lower chamber, the democratically elected House of Commons and the upper chamber, the unelected House of Lords. This 'Select Committee' published a report on evidence received and the Bill was presented to the House of Commons in June 2014 at 'First Reading', a brief formal introductory process. The Bill returned to the House of Commons for 'Second Reading' during which MPs debated its contents in more depth. The Bill then underwent a 'Committee Stage' in the House of Commons during which appointed cross-party MPs debated its contents and proposed amendments that were voted on by the Committee. The Bill then returned to the House of Commons for 'Report Stage' at which time any MP who wished to do so could bring forward amendments to the Bill for debate and instigate votes on such amendments. 'Third Reading' took place immediately after 'Report Stage' in the Commons—the final debate on the Bill before it was sent to the House of Lords. In the House of Lords the Bill underwent the same process: 'First Reading'; 'Second Reading'; 'Lords Committee Stage', which unlike the Commons did not involve votes on amendments to the Bill; 'Report Stage; and finally 'Third Reading'. The Bill then returned to the House of Commons for 'Consideration of Amendments' or 'ping-pong', where Lords amendments were overturned by the government meaning the Bill returned to the House of Lords for 'ping-pong' agreement of the revised Bill. The Bill was then 'enacted' through 'Royal Assent' on 26 March 2015, becoming the Modern Slavery Act 2015.

and it was these amendments that ultimately served to shift the Bill most from its original form. Trafficking for labour exploitation and forced labour were covered in three main ways through the Bill debates: firstly in efforts to change the ‘tied’ overseas domestic worker visa; secondly to provide for corporate supply chain transparency and accountability; and finally to address the limited remit of UK labour inspectorates and particularly the GLA. The first of these issues is backed by a long-standing and broad coalition of NGOs and rights organisations, as well as many opposition Members of Parliament (MPs), who argue that the UK domestic worker tied-visa system resembles the Middle-Eastern *Kafala* system of employer-employee sponsorship. The second issue, corporate accountability, also has broad civil society support from investors, business, NGOs and parliamentarians, and advocacy focused on measures to ensure UK corporations effectively scrutinise their supply chains for labour exploitation. The final issue, UK labour inspection, was much less popular as many saw it as an unattainable goal, particularly in the climate of deregulation and greatly reduced resources for all government agencies. Yet by including labour exploitation as part of the narrative surrounding the Bill the government enabled NGOs like FLEX to make progress on this issue, which might not otherwise have been possible.

FLEX advocacy on the GLA, and on UK labour inspection more widely, sought to ensure that wherever the modern-slavery agenda was used to hide or cloud the impact of immigration and labour deregulation reforms, we would use it to clarify the connection between all three. This became especially important as the parliamentary debate and government policy, mired in immigration tensions, risked moving the GLA away from a focus on its licensing standards, linked to forced labour indicators, towards immigration enforcement. A FLEX working paper used in advocacy on the Bill highlights gaps in prevention of trafficking for labour exploitation in the UK and looks at opportunities for the existing UK labour inspectorates to do more to proactively prevent this crime.¹⁷ In doing so it addresses the limited scope of the GLA and calls for its expansion in to a broad range of UK labour sectors in order to conduct its intelligence gathering work across the UK labour market. This is not a new position, many trade unions and NGOs called for expansion of the GLA almost

¹⁷ C Robinson, ‘Working Paper 01: Preventing Trafficking for Labour Exploitation’, Focus on Labour Exploitation, 2014.

as soon as it was established, but this advocacy had largely subsided in the context of austerity and a strong emphasis on market deregulation.

The GLA was established in the Gangmasters (Licensing) Act 2004 to protect vulnerable workers in the agriculture, food processing, horticulture, forestry and shellfish gathering sectors. The Bill was introduced by Jim Sheridan, a Labour Member of Parliament (MP), shortly after the death of 23 Chinese cockle harvesters who were working for a gangmaster in the northwest of the UK, at Morecambe Bay, in February 2004. Importantly, this legislation not only sets out to protect workers from exploitation but also defines a ‘worker’ to include individuals without the ‘right to be, or to work in the United Kingdom’.¹⁸ The GLA was therefore established in recognition of the fact that workers, documented and undocumented, are vulnerable to exploitation and the state has a duty to act to prevent such exploitation by enforcing labour standards. The focus on labour exploitation in the course of the Modern Slavery Act provided a space for this issue to be revived. At the same time, the precedent set by the Gangmasters (Licensing) Act 2004 provided a means of introducing discussions on labour standards enforcement in to the Modern Slavery Bill debate.

Link between Labour Abuses and Extreme Exploitation

At the Modern Slavery Bill’s first stage, known as House of Commons Committee Stage, the idea of prevention through labour inspection and labour standard enforcement gained traction with the Labour Party. Labour tabled a broad amendment on the GLA, requiring the Home Secretary to review its remit and based on that review to extend it where necessary. The response of Karen Bradley MP, then Minister for Modern Slavery and Organised Crime, to the amendment in the Committee debate was fascinating. She rejected the notion that there was a need for the GLA’s work to reach beyond its limited remit and talked of the range of UK labour inspectorates operating in other sectors. In doing so she foregrounded labour rights abuses against migrant workers across the UK labour market and said the government was ‘determined effectively

¹⁸ Gangmasters (Licensing) Act 2004, Clause 26 (2), retrieved 2 May 2015, <http://www.legislation.gov.uk/ukpga/2004/11/section/26>

to tackle labour exploitation'.¹⁹ Her response covered the work of the national minimum wage inspectorate and the Health and Safety Executive as well as addressing agency worker regulation. She highlighted the work of these agencies in proactive enforcement and providing protections to workers. This debate signaled an important shift from a simplistic victim and criminal narrative to one of degrees and shades of exploitation found across the labour market.

The GLA was again the subject of debate during the next phase of the Bill, Commons Report Stage. Labour tabled an enabling clause to give the Secretary of State the power to broaden the remit of the GLA, if she had evidence to do so. This time amendments were also tabled by a Conservative backbencher Stephen Barclay MP, a strong advocate for the GLA, calling for the authority to be given increased powers.²⁰ At this point the Minister for Modern Slavery's response revealed an understanding of the link between labour abuses and severe exploitation. She stated:

Looking ahead, the GLA is well placed to tackle the serious worker exploitation that lies between the more technical compliance offences investigated by HMRC²¹ and the serious and organised crime addressed by the National Crime Agency.²²

In her remarks, the Minister took a relatively progressive approach in the anti-trafficking sphere, in setting out a range of exploitative labour practices, from labour abuses including non-payment of the minimum wage as investigated by HMRC, to labour exploitation dealt with by the GLA. Her response turned the spotlight on the role of government

¹⁹ K Bradley, Modern Slavery Bill Committee Session 10, UK parliament, 2014, retrieved, 18 February 2015, <http://www.publications.parliament.uk/pa/cm201415/cmpublic/modernslavery/141014/pm/141014s01.htm>

²⁰ House of Commons, Modern Slavery Bill Notice of Amendments, UK parliament, 30 October 2014, retrieved 25 February 2014, <http://www.publications.parliament.uk/pa/bills/cbill/2014-2015/0096/amend/modernslaveryaddednames.pdf>

²¹ Her Majesty's Revenue and Customs, the agency responsible for administration of taxes and the national minimum wage in the UK.

²² K Bradley, Modern Slavery Bill Report Stage, UK parliament, 2014, retrieved 18 February 2015, <http://www.publications.parliament.uk/pa/cm201415/cmhansrd/cm141104/debtext/141104-0004.htm>

agencies such as the HMRC national minimum wage inspectorate, and provided an opportunity to critique their failure to actively prevent labour abuses from descending in to labour exploitation on the spectrum that the Minister herself identified. For years labour rights and anti-trafficking activists have locked horns on the limiting nature of anti-trafficking responses, that only seem to allow for consideration of the most severe labour exploitation, whilst prolific labour abuses seemingly do not warrant consideration. At the very least, during the debate on the Modern Slavery Act, a link between labour abuses and ‘serious worker exploitation’ has been drawn, prising open a space in which to advocate for workers’ rights as a means of preventing trafficking from taking place.

In the House of Lords, parliament’s second chamber, Peers were receptive to discussion on labour regulation and even keener than MPs in the Commons to understand the drivers of severe exploitation in the UK labour market. The Liberal Democrat Party Peer Baroness Hamwee tabled an amendment that acted as a step forward in the way in which trafficking for labour exploitation and forced labour are conceptualised and addressed. Her amendment, entitled ‘exploitation’, called for a review of the Modern Slavery Act, once enforced, along with relevant laws establishing labour inspectorates, to assess whether they protect victims of exploitation.²³ Whilst this amendment was problematic in its use of the vague and undefined term ‘exploitation’ it made an important link between prolific labour abuses, trafficking for labour exploitation and forced labour and the response of labour inspectorates.

Throughout the Act’s progress, the growing parliamentary concern with preventing and identifying the full range of labour exploitation served to lift the veil from the market deregulation measures the Bill was meant to obscure. While the government had committed to rolling back the labour inspectorate infrastructure in the name of ‘deregulation’ and austerity, the debate on the Modern Slavery Act led to a reversal of certain deregulation measures as labour inspection agencies were instead partly boosted. Throughout the debate on the Act the government response to the need to expand the role of the GLA was that the Employment Agencies Standards Inspectorate (EAS) is already operating

²³ Baroness Hamwee, Modern Slavery Bill, New Clause 100, UK parliament, 2014, retrieved 20 February 2015, <http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0051/amend/ml051-IV.pdf>

in the sectors outside of the GLA remit. The EAS oversees the Employment Agencies Act 1973 and the Conduct of Employment Agencies and Employment Businesses Regulations 2003, yet its resources were drastically cut to a skeleton staff of three in late 2013. Experts have pointed out that on a shoe-string budget the EAS has barely had the resources to conduct basic paper checks let alone proactive labour inspection.²⁴ One week before the House of Lords Report Stage, the government committed to increasing resources to the EAS, doubling EAS resources this financial year and potentially increasing it again for the financial year 2015–16, in order to increase staff and conduct more targeted enforcement. This represents a significant u-turn by the government from almost total disbandment of the EAS prior to the Modern Slavery Act debate to a redoubling of its resources.

The final major attempt to introduce a new Clause to the Act on labour inspection and regulation came from the Bishop of Derby in the House of Lords Report Stage. His amendment provided for review of the remit and resources of the GLA and had wide support in the House. In response the Government Minister Lord Bates referenced the government's deregulation agenda, citing concerns about placing financial burdens on business.²⁵ Despite these reservations Lord Bates returned to the House of Lords at Third Reading with an amendment to insert the new Clause 'Gangmasters Licensing Authority',²⁶ which commits the government to a review of the GLA's role. When introducing the amendment the Minister stated:

It is obvious that there is a shared interest right across the House in increasing the GLA's effectiveness and indeed that of all the agencies engaged in the fight against worker mistreatment.²⁷

²⁴ Construction, 'Minister Resorts to Myths When Opposing Gangmaster Licensing—UCATT', Construction, 2010, retrieved 25 February 2015, http://www.construction.co.uk/construction_news.asp?newsid=120309

²⁵ Lord Bates, Modern Slavery Bill Report Stage, Official Report, col. 1713, UK parliament, 2015, retrieved 1 March 2015, <http://www.publications.parliament.uk/pa/ld201415/ldhansrd/text/150225-0002.htm>

²⁶ House of Lords, Amendments to be Moved on Third Reading, Modern Slavery Bill, p.1, UK parliament, 2015, retrieved 1 March 2015, <http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0098/amend/am098-a.pdf>

²⁷ Lord Bates, Modern Slavery Bill Third Reading, Official Report, col. 243, UK parliament, 2015, retrieved 5 March 2015, <http://www.publications.parliament.uk/pa/ld201415/ldhansrd/text/150304-0001.htm#15030468000814>

He went on to say that the government shared the commitment to considering how the GLA ‘can tackle and punish those that abuse, coerce and mistreat their workers’.²⁸ This amendment is weak; it commits the government to an amorphous consultation, that risks providing them with the opportunity to further divert the GLA from its labour inspection role towards crime control or immigration enforcement. In this respect the amendment could do more harm than good, and yet it also offers advocates an opportunity to reinforce the importance of the GLA’s work to enforce labour standards and protect vulnerable workers.

Lessons for Advocates

The focus of attention on immigration, deregulation and now slavery in the UK has provided a unique opportunity to reframe the human trafficking debate to incorporate the central importance of labour rights. It has opened up the possibility of debate on the negative impact of our flexible, migrant dependent labour market on labour standards, and the link between deteriorating labour standards and severe exploitation. The Modern Slavery Act acted as a diversion from hostile migration control measures and labour market deregulation. However it has simultaneously provided space for debate about labour rights and the rights of migrant workers to be heard by those in power, free from the traditional associations with polarising trade union or pro-immigrant politics.

The UK Modern Slavery Act experience provides some useful lessons to advocates. Primarily that unless we seek opportunities to make labour rights central to anti-trafficking law and policy, we will instead find ourselves with legislation that purports to protect the rights of workers and yet achieves the opposite. When faced with the not-so-hidden agenda to use the modern slavery rhetoric to deflect concerns about immigration and deregulation measures, it is tempting to turn advocacy attention elsewhere for risk of being seen to support such cynical moves. However, discussions with migrant community organisations and trafficked persons in the UK suggest that we do not have that luxury. As migrant rights and labour rights are being eroded to the point at which exploitation flourishes, when a small window of recognition of that fact by the government opens up it should be seized, albeit cautiously.

²⁸ Ibid., col. 244.

Many argue that human trafficking can be used to create a convenient state-centric hierarchy of victims, ignoring the structural obstacles inherent in capitalism that prevent labour standards from being met. Rogaly, for example, suggests that from the outset a core driver of the Modern Slavery Bill in the UK was an effort to move the public attention away from the ‘range of ways in which capitalism itself creates, perpetuates, and relies on forms of unfree labour’.²⁹ Others such as Fudge highlight the dangers for advocates of engaging in the Modern Slavery Act debate.³⁰ She argues that by linking the human rights of exploited workers with the modern slavery agenda advocates ‘reinforce, rather than challenge an approach that emphasises the criminal law and border controls’.³¹ The link between border security and anti-trafficking efforts has been well documented in issue 2 of this journal, and the threat of immigration enforcement action against exploited individuals who enter the trafficking system is very real. The opportunity to disrupt irregular migration flows that the trafficking framework provides has long held appeal to states.

The Modern Slavery Act was conceived with similar goals as much of the anti-trafficking legislation the world over, to reinforce a state-centric rather than victim-centric means of protecting victims from exploitation by placing huge emphasis on prosecuting traffickers. However as with much anti-trafficking debate, the Act also permitted discussion about the impact of ongoing labour deregulation on vulnerable workers, compensation for non-payment of the national minimum wage and the need to properly regulate employment agencies. These are important issues that are rarely tackled by this government from the perspective of the worker and yet this Act, flawed as it is, provided room for that debate. To leave the anti-trafficking or anti-slavery crusade to states would be to turn our backs on the very people we asked states to assist in the first place, simply because we do not like the responses initiated in their name.

²⁹ B Rogaly, ‘Immigration Politics, Slavery Talk: The case for a class perspective’, Open Democracy, 2015.

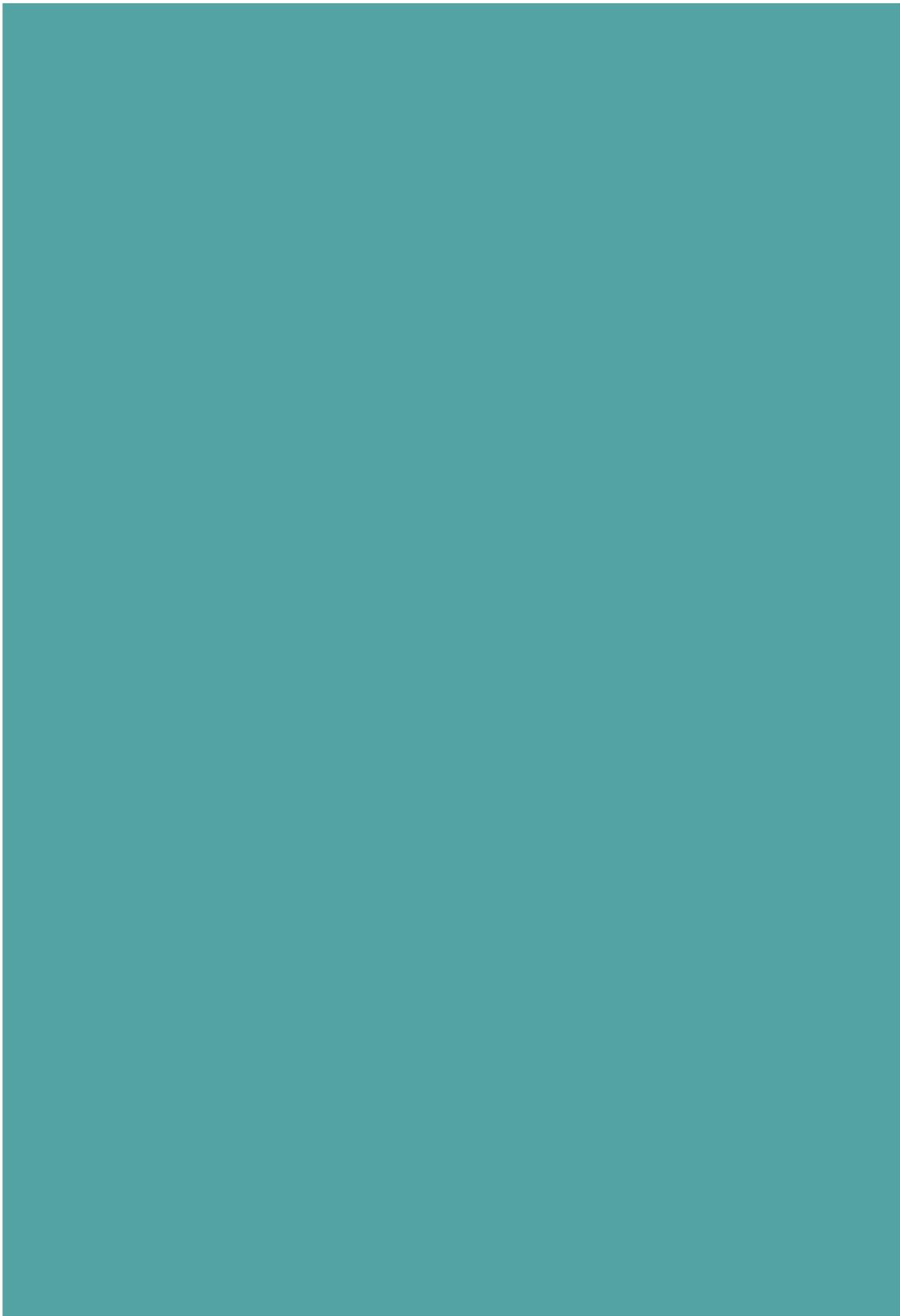
³⁰ J Fudge, ‘The Dangerous Appeal of the Modern Slavery Paradigm’, Open Democracy, 2015, retrieved 5 May 2015, <https://www.opendemocracy.net/beyondslavery/judy-fudge/dangerous-appeal-of-modern-slavery-paradigm>

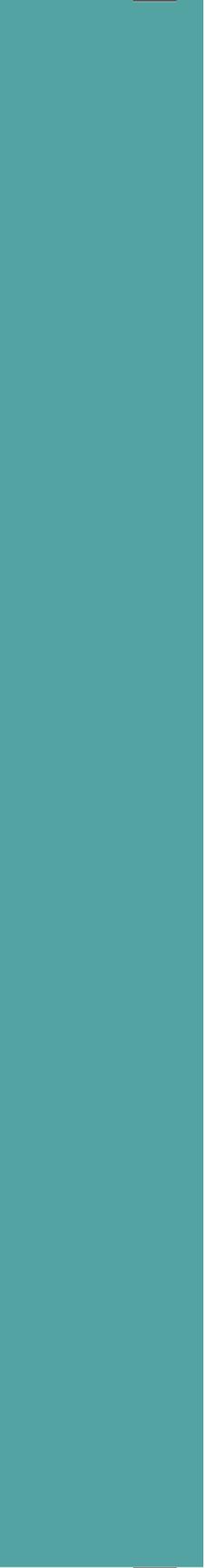
³¹ Ibid.

Conclusion

Whilst the opportunities for debate on labour rights, and migrant labour rights in particular, were limited in the wider UK political context, the Modern Slavery Act provided a useful vehicle for such discussion to take place. The GLA seemed, like many other UK labour inspectorates, doomed to experience further cuts and increasing reductions to its mandate. However, the Modern Slavery Act pushed senior government ministers to link labour abuses and modern slavery and politicians on all sides to consider the spectrum of labour abuses. Deregulation and anti-migrant policies in the UK actively create the space for exploitation, particularly of migrant workers, to flourish. The Modern Slavery Act provided cover for these policies, whilst the discourse of exploitation has also given the opposition Labour Party the opportunity to talk about immigration. Yet, all the while the Act provided space for advocates to uncover those same policies and motives. The debate on the role of the UK's labour inspectorates in the Modern Slavery Act has provided a useful example of the way in which the conversation on labour exploitation has evolved. It also offers lessons for future advocacy in this area, acknowledging the limitations of the anti-trafficking framework and setting out strategies to address such constraints. Ultimately as advocates there is a need to seize opportunities to bring about change. The Modern Slavery Act provided such an opportunity in a hostile political climate and demonstrates our responsibility to engage in debates on trafficking in order to reclaim the political ground on behalf of and with trafficked persons.

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Debate Proposition: Should we distinguish
between forced labour, trafficking and
slavery?

The Challenges and Perils of Reframing Trafficking as ‘Modern-Day Slavery’

Janie Chuang

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In the last five years, we have seen a rebranding of global anti-trafficking efforts as ‘modern-day slavery’ abolitionism. The United States of America (US) Department of State and powerful philanthropists are key proponents of the slavery makeover, prompting other governments, international organisations, and non-governmental organisations alike to adopt the ‘modern-day slavery’ frame. The slavery frame has helped ignite outrage and galvanise political support for modern anti-slavery campaigns. It has also helped expand the anti-trafficking spotlight beyond the sex sector to expose the extreme exploitation that men, women, and children suffer in the non-sexual labour sectors of our global economy. These benefits come at a cost, however, both with respect to legal doctrine and practice, and, perhaps more significantly, to how we understand and respond to the problem of extreme exploitation for profit.

One does not have to be a legal purist to appreciate the risks that come with building a global movement around a broadly-defined, made-up concept of ‘modern-day slavery’. Each of modern-day slavery’s purported component practices—slavery, trafficking and forced labour—is separately defined under international law, subject to separate legal frameworks and overseen by separate international institutions. Conflating trafficking and forced labour with the far more narrowly defined (and extreme) practice of ‘slavery’—however rhetorically effective—is not only legally inaccurate, but it also risks undermining effective application

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of the relevant legal regimes. Legal definitions matter when it comes to providing a common basis for governments worldwide to collect and share data, to facilitate extradition of criminal suspects, and to pursue policy coordination with other governments. They also matter when it comes to individuals directly affected by the legal regimes designed to identify perpetrators and provide redress to victims of slavery, trafficking and forced labour practices.

For example, conflating trafficking (and forced labour) with slavery risks implicitly *raising* the threshold for what counts as trafficking. In the US, for example, we have already seen how strategic use of slavery imagery by defense counsel in trafficking prosecutions can raise jurors' expectations of more extreme harms than anti-trafficking norms actually require. That not only undermines prosecutorial efforts, but it renders accountability and redress for victims even more elusive than they already are. Similarly, diluting the slavery norm risks undermining its *jus cogens*¹ status, which in turn could compromise the international community's ability to prosecute alleged perpetrators of slavery—a practice that, albeit rare, still exists in parts of the world. A flexible or indeterminate interpretation of what counts as slavery also risks violating the principle that crimes and punishments should be clearly defined in the law (*nullum crimen sine lege, nulla poena sine lege*), thus compromising the rights of the accused.

Perhaps equally, if not more, concerning is how the slavery makeover can limit how we understand and respond to modern-day exploitation for profit. As sociologist O'Connell Davidson has explained, slavery rhetoric and imagery can serve as a 'discourse of depoliticization.'² Typically, slavery imagery is used to distill the complex phenomenon of trafficking into a simple narrative of crime perpetrated by evil individuals and organisations, and suffered by victims who (like 18th-century transatlantic slaves) must have been kidnapped or otherwise brought to the destination countries against their will. Depicting slavery as the product of individual deviant behavior, modern-day slavery abolitionism creates a simple moral imperative with enormous popular appeal. And in so doing it depoliticises and absolves—behind a humanitarian agenda—the

¹ *Jus cogens*, or peremptory norms, are overriding, fundamental principles of international law, from which no derogation is permitted.

² J O'Connell Davidson, 'New Slavery, Old Binaries: Human trafficking and the borders of 'freedom', *Global Networks*, vol. 10, issue 2, 2010.

state for its role in creating the structures that permit, if not encourage, coercive exploitation of workers, especially migrants. The resulting prescriptions thus narrowly focus on punishing the enslavers and rescuing innocent victims. They further suggest that governments, corporations and individuals can eradicate slavery simply by engaging in more ethical consumption of goods and services.

Any commitment to addressing the *structural* contributors to the problem thus becomes extraneous to the anti-slavery project. States need not, for example, consider the relationship between tightened border controls and the growth in the market for clandestine migration services. They need not question the wisdom of guestworker programmes that fail to guard against employers and recruiters using the threat of retaliatory termination and deportation to chill worker complaints and worker organising. Instead, states can continue their heavy focus on penalisation and rescue strategies, despite their disappointing results. Meanwhile, the growing ranks of ‘philanthrocapitalists’ can apply their considerable skill at accumulating wealth to fixing the world’s slavery problem.³ We can maintain faith in the infallibility of their good intentions rather than question the merits of a system that enabled such wealth while also creating the vast global inequalities that feed coercive exploitation of the world’s poor.

To be sure, crime control and corporate social responsibility measures are crucial tools in the fight against modern exploitation. But far more is required to attack the roots of the problem. It may be inevitable that forced labour and trafficking are discussed in terms of ‘modern-day slavery’—but if so, we must be far better attuned to both what the slavery analogy reveals and what it obscures. The recent renaissance in slavery scholarship holds exciting potential for comparing the political economies of the slavery practices of the past and the trafficking/forced labour practices of the present.⁴ That scholarship has underscored, for example, how states that had condemned chattel slavery in the US nonetheless profited from the interstate commercial trading system created

³ J Chuang, ‘Exploitation Creep and the Unmaking of Human Trafficking Law’, *American Journal of International Law*, vol. 108, no. 4, 2014; J Chuang, ‘Giving as Governance? Philanthrocapitalism and modern-day slavery abolitionism’, *UCLA Law Review*, 2015 (forthcoming).

⁴ E E Baptist, *The Half Has Never Been Told: Slavery and the making of American capitalism*, Basic Books, New York City, 2014.

and fueled by the slave trade. Understanding modern practices against that historical backdrop might help surface how the prosperity of today's wealthiest countries is similarly pinned to the pain of extremely exploited migrant workers—even as these countries lead the 'anti-slavery' charge. Or how the very exploitation we condemn as immoral actually drives our globalised economy—enabling wealthy countries to extract profits from migrants' cheap labour and poorer countries to extract revenue from their remittances.

A far more nuanced depiction of 'modern-day slavery' would expose these and other deeply uncomfortable truths about how our societies and economies are structured. But confronting those truths also opens up a host of new possibilities that seek to prevent exploitation by targeting structural vulnerability. Such alternative strategies should include reforming certain aspects of current labour and migration frameworks that invite and reward the exploitation of world's poor. These might include, for example, developing interstate mechanisms to better manage foreign labour recruitment, and strengthening domestic labour protections to empower workers to meaningfully resist coercive exploitation. Pursuing such strategies would be a departure from the penalisation and rescue models that have long dominated and defined the anti-trafficking field. But this is necessary if the modern-day slavery movement is to deliver on its promise of freedom.

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When it Comes to Modern Slavery, do Definitions Matter?

Fiona David

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On the 3rd of April 2015, Indonesian government officials visited the remote island village of Benjina.¹ This followed press reports by Associated Press (AP) that Burmese men were being kept on Benjina island in cages, beaten with stingray tails and paid little or nothing, to fish for a company that occupies the port on the island, Pusaka Benjina Resources.

As news of a possible rescue filtered around the island, AP reports hundreds of men 'weathered former and current slaves with long, greasy hair and tattoos streamed from their trawlers, down the hills, even out of the jungle, running toward what they had only dreamed of for years: Freedom.'

AP used the word 'slavery'. The reporters also described the men as having been 'trafficked'. Were these men 'slaves', or in 'forced labour', or had they been 'trafficked'? Is it important what we call them? Certainly organisations working on this issue spend an awful lot of time focusing and arguing about the finer distinctions between these terms. Some of this debate reflects overlaps and a lack of certainty about the meaning of parts of the legal definitions, while some of this debate reflects political differences.

¹ R McDowell and M Mason, 'AP Investigation Prompts Emergency Rescue of 300 Plus Slaves', AP, 3 April 2015, retrieved 23 July 2015, <http://bigstory.ap.org/article/197048ef871f4b56b4a129d0e3c0f129/fishermen-rush-be-rescued-amid-indonesian-slavery-probe>

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Do the distinctions between the concepts of human trafficking, forced labour and slavery matter? When and why?

In some ways, even small differences in definitions are critically important. For example, from a political perspective, governments have negotiated and agreed with one another what these terms mean. As a result, they have made national laws to ensure these acts are criminalised. While important grey areas remain, internationally negotiated definitions provide a level of certainty that allows international legal cooperation on this crime type. In theory, those responsible for the Benjina abuses can be prosecuted for roughly equivalent crimes in either Indonesia or Thailand.

From a legal perspective, it is important that investigators are able to lay charges that are commensurate with the severity of the offence and that they are able to find evidence to prove the elements of each offence. This is impossible without clear, functional definitions that can be translated into national laws. In this sense, definitions—and differences between terminology—are the foundation of a justice system that serves all: the community and, those most affected, victims of the crime.

However, in other ways, the finer distinctions between the concepts of forced labour, slavery or human trafficking have limited, if any, relevance.

Consider the perspective of the men involved. From media reports, it appears all had been subjected to violence and abuses, to contain them, to control them, to extract their labour against their will and prevent them from leaving their employment. Do you think they care if their experiences met the three-part definition of human trafficking found in the United Nations Trafficking Protocol?²

Consider the value of the investigative journalism that shone a light on this situation and ultimately lead to these men being rescued. Does it matter to the average reader whether these men were slaves, in forced labour or trafficked? I expect not. What matters is that the general public understands that situations of this nature still occur even today and that they have the capacity to influence these situations through their consumer

² In full: United Nations General Assembly, *United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, 12-15 December 2000.

choices and pressure on governments who continue to be complicit through inaction or willful blindness.

In this regard, the Indonesian government is to be congratulated for responding to this situation swiftly and pragmatically. According to media reports, while Indonesian officials initially offered protection to a small group of men who talked openly about their abuse, confronted with the reality of the situation, the Indonesian command declared:

‘They can all come’, he said. ‘We don’t want to leave a single person behind.’

This stands in direct contrast to the Thai delegation that had visited earlier that week, reporting that no abuses were occurring.

Definitions do matter in some contexts but we must not lose sight of the facts that they are not the end in itself, and insistence on technical definitions does not always serve a purpose. If definitions help law enforcement officials recognise victims, or if they help legal systems run more effectively, then they serve a purpose. However, if use of technical terms in public debate means we effectively speak to ourselves but fail to inform our audience, then definitions are not serving us well. Also, as a sector, we cannot let a focus on differences in terminology distract from some areas that are clearly within scope from any perspective. Few would disagree that the Benjina situation is both criminal and an appalling abuse of human rights. What we call this situation matters less than ensuring we focus on identifying these situations, getting help to people who need it, and that we hold governments, corporations and individuals involved to account for their role in these crimes.

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

Roger Plant

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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?

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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 trafficking¹ 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.

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

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).

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 policies 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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Towards a Cohesive and Contextualised Response: When is it necessary to distinguish between forced labour, trafficking in persons and slavery?

Marja Paavilainen

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In my view, the answer to the debate question of whether it is necessary to distinguish between forced labour, trafficking and slavery depends on the context. Therefore the focus should instead be on identifying *when* it is necessary to distinguish and when it is not required. Furthermore, an essential follow-up is the question of *how* we can prevent and address these different forms of coercion in a coherent manner.

Before addressing the above questions from the context of East and Southeast Asia, a few notes should be made to clarify my understanding of the concepts. Put simply, in my view, trafficking in persons can be best understood as a process. Forced labour on the other hand is an outcome, a workplace situation. Some victims end up in forced labour through being trafficked, some through other channels. In East and Southeast Asia, both forced labour and trafficking are intrinsically linked to labour migration, where people move in search of better livelihoods and become tricked and trapped in jobs that they cannot leave. This strong labour market character of forced labour crime and trafficking in persons crime is evident in International Labour Organization (ILO) estimates of forced labour, which show that 90% of the total 21 million victims of forced labour globally are exploited in the private economy in various industries including sex work, and almost 12

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million of these victims are in the Asia-Pacific region.¹ Similarly, United Nations Office on Drugs and Crime (UNODC) data shows that in the Asia-Pacific region 64% of detected trafficking victims were trafficked for forced labour, while 26% were trafficked for sexual exploitation.²

So, *when* is it then necessary to distinguish between the concepts of forced labour, trafficking in persons and slavery, and when not?

The area where distinguishing between these concepts is most important is national legislation and its enforcement. In East and Southeast Asia, countries have taken different approaches to criminalising forced labour, trafficking in persons and slavery. Some have established broad trafficking offences covering multiple types of exploitation, while others have narrower trafficking offences supplemented by separate forced labour offences and/or slavery offences. Therefore, the options available for prosecution, as well as civil and administrative sanctions and remedies, differ. For example, a case that is prosecuted as trafficking in persons for forced labour in Malaysia would be prosecuted as a forced labour crime in China. Regardless of the legislative approach selected, in every country law enforcement authorities need clear guidelines on how to apply their own national legislation and how to identify a case of forced labour, trafficking in persons or slavery. Any confusion between the concepts can hamper proper identification, investigation and prosecution of cases.

Noting these different approaches to criminalising forced labour, trafficking in persons and slavery, one is tempted to ask which one of the approaches is the best. Or, which approach best conforms with international legal obligations of states under the Trafficking Protocol³ and the Forced Labour Convention.⁴ Due to the overlapping nature of the concepts, state obligations under these instruments are also overlapping. The Forced Labour Convention requires making illegal exaction of forced labour punishable as a penal offence, and the Trafficking Protocol requires establishing trafficking in persons as a criminal offence. From the perspective of the Forced Labour Convention it does not really matter if forced labour is criminalised separately or as part of

¹ ILO, 'Global Estimate on Forced Labour', International Labour Office, 2012.

² UNODC, 'Global Report on Trafficking in Persons 2014', UNODC, 2014.

³ UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, (Trafficking Protocol).

⁴ ILO, *C029—Forced Labour Convention, 1930 (No. 29), Convention concerning Forced or Compulsory Labour*, 28 June 1930.

slavery or trafficking offences, as long as all forms of forced labour are covered. (To use a quote from late Chinese leader Deng Xiaoping, ‘it doesn’t matter if a cat is black or white, so long as it catches mice’.) This open-mindedness to various legislative approaches is, in my experience, sometimes missing within the international development community where there is a tendency to focus solely on specific concepts such as trafficking or forced labour instead of seeing the bigger picture. In my view, the international community needs to be accepting and sensitive to this legislative diversity which is crucial when supporting national legislative processes to strengthen penal provisions against forced labour, trafficking in persons and slavery. Consequently, the ILO’s ongoing technical support for Penal Code reforms in East and Southeast Asia takes a dual approach of promoting the establishment of stand-alone forced labour offences and strengthening responses to trafficking in persons offences. This is to ensure full coverage and more options for investigating and prosecuting cases of labour exploitation.

While conceptual clarity is crucial in national legislation and its enforcement (whatever the legislative approach chosen), in my view *prevention* of forced labour, trafficking in persons and slavery requires a coherent ‘labour approach’. This is because of the joint root causes and the strong labour market character of these forms of coercion in East and Southeast Asia. In this context, such an approach involves, among others, promoting safe labour migration and improving labour protection in migrant-dominated economic sectors. In formulating a labour-market-based response to forced labour, trafficking in persons and slavery, guidance provided in the Protocol of 2014 to the Forced Labour Convention (Forced Labour Protocol) and the Recommendation supplementing it is very relevant.

Another area where distinguishing between the concepts of forced labour, trafficking in persons and slavery is in my view less important is the awareness raising of vulnerable workers and support to victims of exploitation. It is much more important to make sure vulnerable groups and exploited workers know what their rights at work are, what kinds of recruitment or employment practices violate these rights, and, most importantly, who to contact for help if problems arise. It is then the first responders’ and legal counsels’ role to advise the worker about the different available channels for seeking legal redress, and whether or not the violations suffered amount to forced labour, human trafficking or slavery in the jurisdiction in question. Similarly, protection and remedies for all victims of forced labour and slavery should in my view be the same, regardless whether or not they were trafficked. The Forced

Labour Protocol and the Recommendation supplementing it provide detailed guidance also in these areas.

Preventing and addressing forced labour, trafficking in persons and slavery in East and Southeast Asia requires a cohesive and contextualised approach, which recognises the labour market character of these various forms of coercion. The responses need to be based on conceptual clarity and good understanding of when distinguishing between the legal concepts is needed and when the focus should rather be on addressing the joint root causes of forced labour, trafficking in persons and slavery.

The cohesive approach to forced labour, trafficking in persons and slavery should draw on the strengths of each of the concepts. One discussant summarised these strengths very well during the online discussion on ‘What is forced labour, human trafficking and slavery? Do definitions matter, and why?’, which I recently moderated on the ILO’s Asia Pacific Forced Labour Network (AP-Forced Labour Net).⁵ She noted that the trafficking framework provides a strong basis for international cooperation, whereas the forced labour framework provides a more contextual, collective and systemic approach that allows greater focus on prevention and remedies rather than solely on prosecution. The slavery concept on the other hand provides the historical and emotive power that can be deployed to awaken public consciousness and motivate governments to act.⁶ I hope that better understanding of the legal concepts, their strengths, weaknesses and linkages, and the joint root causes of forced labour, trafficking in persons and slavery can help us better combat these forms of coercion in East and Southeast Asia and beyond.

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⁵ AP-Forced Labour Net (<http://apflnet.ilo.org/>) is an ILO-sponsored online knowledge sharing platform created to help those interested in forced labour, trafficking in persons and slavery in Asia-Pacific connect, share resources, exchange ideas, and learn about preventing and addressing forced labour.

⁶ The online discussion report is available at: http://apflnet.ilo.org/discussions/resources/online-discussion-report_what-is-forced-labour-human-trafficking-and-slavery-do-definitions-matter-and-why.

Use of the Term 'Bonded Labour' is a Must in the Context of India

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There is no question that we should distinguish between forced labour, trafficking and slavery. But, we should also include in the debate another concept, 'bonded labour,' as it describes a distinct and widespread form of forced labour in India that does not fully accord with the International Labour Organization's (ILO) definition of forced labour. The sociopolitical reality in India and bonded labour's intimate link with the Indian caste system demand that the term 'bonded labour' be retained in the discourse on forced labour and trafficking in persons. Addressing bonded labour enables two interconnected areas of exploitation and discrimination to be addressed, namely working towards emancipation of the minority Dalit community and of the Moolnivasi indigenous communities.

Bonded Labour

According to most recent World Bank figures, in 2009, 23.7% of Indians lived below the international poverty line of less than USD 1.25 per day.¹ Most of those are Dalits and Moolnivasis, and they constitute an

¹ World Bank, 'Poverty and Equity Country Dashboard: India', retrieved 07 August 2015, <http://povertydata.worldbank.org/poverty/country/IND>

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overwhelming majority of bonded labourers.² In some regions, they make up 90% to 95% of such labourers.³ This sheds light on an important aspect of bonded labour in India: it is not just an issue of poverty, it is a complex social issue and a continuing element of the all-pervasive caste system, rooted in discrimination against minority and indigenous groups.

Historically, in the typical traditional caste system, Dalits performed all forms of menial labour for the so-called 'higher caste' families and for the village as a whole, without any wage. Remnants of these forms of caste-based services still exist in many villages throughout India. During the British rule of India, this 'caste slave labour' was replaced to a great extent by bonded labour passing through a system of contract labour known then in the British Empire as 'indentured labour'.⁴ Community-owned land was privatised through various Land Settlement Acts in the late 18th century, and wage labour and cash payments increasingly became the norm. Dalit and Moolnivasi populations were moved *en masse* as indentured labourers from one region in India to another and also moved overseas to other British colonies to work in coffee or tea plantations,⁵ in to various types of mines, and to lay railway lines. They were forced to sell their labour for wages that were not sufficient to cover even their basic needs, let alone those of their family members. Eventually, even in villages, the earlier 'caste-slave labour' characterised by 'patron-client' relationships was replaced by wage labour. The wage labourers had to resort to taking advances or loans, and, in lieu of that, they started mortgaging their and their family members' labour to the creditor. The most indigent among the Dalits and Moolnivasis in villages today survive through bonded labour.

² S Marla, *Bonded Labour in India, National Survey on the Incidence of Bonded Labour*, Biblia Impex Private Ltd., New Delhi, 1981, p. 17. '86.6% of the bonded labourers come from the underprivileged section of Harijans and Adivasis (scheduled castes: 61.5%, scheduled tribes: 25.1%).' Harijans are scheduled castes, and Dalits are referred to in the article; Adivasis are scheduled tribes, and Moolnivasis are referred to in the article.

³ K K Prasad, *Bonded Labour in Anekal Taluk, Bangalore Urban District, An analysis*, Jeeta Vimukti Karnataka, Bangalore, 1991.

⁴ Indentured labour was a form of contract labour prevalent in the British Empire in the late 18th to the early 20th century, wherein labourers were compelled to render labour against the advances they received, failing which they were made to undergo stringent punishments.

⁵ J Sharma, 'Introduction' in D Ganguli (ed.), *Slavery in the British Dominion*, 1886, pp. 28-32; 'From 1838 to 1920, indentured contracts took more than two million laborers from India, China, and Southeast Asia to British Colonial plantations across Assam, Natal, Ceylon, Malaysia, Fiji, Mauritius, Surinam, and the West Indies.' A Schifffrin (ed.), *Global Muckraking, 100 Years of Investigative Journalism from around the World*, The New Press, New York, 2014, p. 28.

Bonded labour and debt bondage are not defined in international instruments. By contrast, the Bonded Labour System (Abolition) Act 1976 of India does provide definitions of bonded debt, bonded labour and bonded labourer, as well as a more comprehensive definition of the bonded labour system. According to the Act, the bonded labour system is a system of forced labour in which a debtor, either for a loan, advance or any other economic consideration (or hereditary, customary, social or caste obligation), agrees to render service for no wages or for only a nominal wage. The system also includes situations where the debtors are prevented from selling labour or the product of labour to anyone else or where their free movement is severely obstructed. The Indian Supreme Court has clarified that forced labour need not only involve physical or legal compulsion, it is also found in situations where a person agrees to work for nominal wages, i.e. wages below the statutory minimum wage or the prevalent wages, due to economic hardship. Thus the Supreme Court has given a definition of what constitutes ‘force’ that is even broader than that in the International Labour Organization (ILO) definition of forced labour.⁶ Involuntariness is an important constituent of forced labour in the ILO definition, but under the Indian Act, bonded labour results from an agreement between a debtor and her/his creditor, wherein the bonded labourer seems to ‘agree’ to the conditions of bonded labour. This agreement on the part of a bonded labourer, though indicating that he/she is freely entering into the agreement, does not mean it is not forced labour.

⁶ Forced labour means all work or service that is exacted from any person 1. Under the menace of any penalty and 2. For which the said person has not offered herself voluntarily. ILO, *C029—Forced Labour Convention, 1930 (No. 29), Convention concerning Forced or Compulsory Labour*, 28 June 1930.

Similarities and Differences between Slavery⁷, Slavery-like Practices⁸, Forced Labour, Bonded Labour and Trafficking in Persons⁹

Slavery-like practices, bonded labour and debt bondage, forced labour and trafficking in persons are intimately related. If slavery denotes absolute right of ownership over a person, slavery-like practices denote considerable amounts of, though not absolute, control over a person. If forced labour and bonded labour both involve extracting labour from a person, bonded labour in a majority of the cases is linked to caste discrimination and customary and hereditary obligations. ‘Slavery-like practices’ is a notion that goes further and includes forced labour, human trafficking for exploitation, whether physical/labour or sexual exploitation, forced marriage, sale and exploitation of children and removal of organs. If slavery, slavery-like practices, forced labour and bonded labour denote the end result, human trafficking also includes the process leading to the end result—an inclusion that is not found in all other terms.

All these rights violations are interrelated and, in some sense, overlapping or constitute a continuum. In the Indian context, what we have to bear in mind is that all these forms are found in varying degrees, but bonded labour and debt bondage account for the highest proportion among them all—possibly 80% to 90%. Traditional forms of bonded labour in

⁷ Slavery means the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised. United Nations, *Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926*, 9 March 1927.

⁸ Slavery-like practices are debt bondage, forced or servile marriage, sale or exploitation of children (including in armed conflict) and descent-based slavery. Office of the High Commissioner for Human Rights, *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 7 September 1956.

⁹ Trafficking in Persons has the following three main elements: 1. Act of: recruitment, transportation, transfer, harbouring or receipt of persons. 2. By means of: threat or force or other forms of coercion, abduction, fraud, deception, the abuse of power or a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person. 3. With the intent of: exploiting that person through prostitution of others, sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, and removal of organs. The consent of a victim of trafficking in persons to the intended exploitation set forth above shall be irrelevant where any of the means set forth above have been used. UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000.

agriculture constitute 60% to 70% of debt bondage in India. Trafficking does not play a significant role in this form of bonded labour.¹⁰

Yet, internationally, ‘trafficking in persons’ is increasingly used as an overarching term for all of these forms of exploitation. Though the Indian Constitution prohibits, as a fundamental right, *begar* or unremunerated labour, forced labour and trafficking in persons under one article, the practice of addressing these different forms has taken divergent routes. There are separate statutes and departments addressing human trafficking and bonded labour. Whereas trafficking in persons in India is restricted to trafficking persons for commercial sex work and is handled by the Home Ministry, bonded labour does not include trafficking for commercial sex work and is dealt with by the Labour Ministry at the central level. The amendment to Section 370 of the Indian Penal Code in 2013 adopted the United Nations definition of trafficking in persons, giving scope for the Home Ministry to address bonded labour as one form of exploitation along with sexual exploitation. However, again, trafficking is not a component in all cases of bonded labour in India. In fact, for the majority of bonded labour cases in villages in India, the trafficking definition does not fit.¹¹

Political Reality in India: Bonded labour, forced labour and trafficking

Bonded labour is a reality encountered by all those working with Dalits and Moolnivasis, as well as those with a focus on forced labour, slavery-like practices and trafficking in persons. But advocates, like myself, face stiff resistance from all sections of the government both to recognising the practice as a problem and to committing to its eradication. A deep culture of denial of bonded labour is the norm in all branches of governance, be it legislative, executive, police and judiciary, or levels of

¹⁰ In absence of statistical data, the percentages here are rough yet informed estimates from my experience of working on bonded labour in the agricultural sector since 1998. Bonded labourers are not trafficked by an agent to a distant place; very often it is the bonded labourers themselves, and, in cases of children, their guardians, who go in search of masters, very often in their own villages or at the furthest in neighbouring villages.

¹¹ In most cases of bonded labour in villages, trafficking is not involved. The trafficking definition is more likely to apply (though still not necessarily) in a minority of cases where bonded labour involves migration.

governance, from national level to gram panchayat (a cluster of villages). In spite of the strong provisions in the Indian Constitution and a powerful Act, bonded labour is largely dismissed as a phenomenon of the distant past, like slavery, and abolished by legislation. Yet ample evidence¹² testifies to its continuing existence. While the term ‘trafficking in persons’ has gained traction across India, the focus on trafficking arguably feeds this culture of denial as regards bonded labour, leading to a situation where the reality of bonded labour can be totally ignored under the pretext that the practice in villages does not constitute traffic in persons.

I advocate retaining the term bonded labour in the discourse on forced labour, slavery and trafficking in persons, until all forms of bonded labour are eradicated in India.

Kiran Kamal Prasad is the Coordinator of JEEVIKA—Bonded Labour Liberation Front in Karnataka, India. He has been working with Dalits since 1985 and took up research on bonded labour in 1988 in a taluk (sub-district) of Bangalore. He used the data from the research, which identified nearly 700 bonded labourers, to lobby at the state legislature in 1990 and simultaneously started conscientising and unionising bonded labourers in that taluk. JEEVIKA was launched in 1993 to extend the movement to the entire state. Before working against bonded labour, from 1983 Prasad worked with Siddis and Bantu groups from Africa in Karnataka, India, and was instrumental in achieving Indian Parliament recognition of the groups as a Scheduled Tribe in 2003.
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¹² M Yadav and K K Prasad, ‘Bonded Labour Thrives Even Today in Karnataka’ in M Yadav, *A Comprehensive Study on the Status of Scheduled Castes in Karnataka*, Centre for Study of Social Change and Development, Institute for Social and Economic Change, Bangalore, 2014, pp. 277–328; S Sethia, ‘Bonded Labourers’ in H Mander (ed.), *India Exclusion Report 2013–14*, Books for Change, Bangalore, 2014, pp. 203–219; Walk Free Foundation, ‘The Global Slavery Index 2014’, Walk Free Foundation, 2014; Walk Free Foundation, 2013; ILO, ‘ILO Global Estimate of Forced Labour: Results and Methodology’, International Labour Office, 2012; R S Srivastava, *Bonded Labour in India, Its Incidence and Pattern*, ILO, 2005; in addition, there are plenty of recurring reports in Indian newspapers and magazines, both in English and the various local languages.

ANTI-TRAFFICKING REVIEW

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