

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

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Please cite this article as: M Paavilainen, 'Towards a Cohesive and Contextualised Response: When is it necessary to distinguish between forced labour, trafficking in persons and slavery?', *Anti-Trafficking Review*, issue 5, 2015, pp. 158–161, www.antitraffickingreview.org

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 million of these victims are in the Asia-Pacific region.¹ Similarly, United Nations Office on Drugs and Crime 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 slavery or trafficking offences, as long as all forms of forced labour are covered. (To use a quote from late Chinese leader

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.

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 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.