

# State responsibility for modern slavery: uncovering and bridging the gap

**Modern slavery, an umbrella term for human trafficking, slavery, servitude, forced or compulsory labour and child labour, is one of the prevailing challenges for the international community, with 24.9 million people in modern slavery on any given day in 2016<sup>1</sup>. States committed to fight against it in the 2030 Sustainable Development Agenda (SDG 8.7).**



SDG 8.7: Take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms.

The efforts of States against modern slavery are mainly focused on their responsibility to 'prevent, protect and punish' offences committed by non-state actors. Unfortunately, that approach remains insufficient when States are involved in the commission of the offence through State policy (direct) or through the actions or omissions of a State organ or official (indirect). That gap needs to be uncovered in order to advance efforts in tackling modern slavery.

The project 'State responsibility for modern slavery: uncovering and bridging the gap'<sup>2</sup> aims at finding a complementary relationship between those two approaches by unpacking the potential of the principles of State Responsibility codified by the International Law Commission.

<sup>1</sup> Global Estimate of Modern Slavery, September 2017; ILO, Walk Free Foundation. The scope of this project, and the estimate provided, do not include forced marriage.

<sup>2</sup> Developed by Dr Philippa Webb and Dr Rosana Garciandia (King's College London), in cooperation with the United Nations University, with the support of the British Academy Scheme Tackling the UK International Challenges 2017.

## Five scenarios of potential State responsibility for modern slavery

The analysis of evidence indicates that certain practices and policies of some States could amount to a breach of the prohibition of slavery, forced labour and human trafficking<sup>3</sup> and constitute an internationally wrongful act entailing the international responsibility of that State under the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA). The conduct of State officials, bodies or agencies may also involve the State in a modern slavery situation. Even non-State entities exercising public powers such as employment agencies or export credit agencies could compromise the State if they engage in an activity tainted by modern slavery.

Fact patterns have been grouped in the following five scenarios of State involvement in modern slavery that could give rise to their responsibility.

SCENARIO	FACT PATTERNS
<b>Scenario 1</b> <b>Modern slavery as State policy</b>	<ul style="list-style-type: none"> <li>• Human trafficking and forced labour cases apparently arising from State policy.</li> <li>• Forced labour used to achieve production quotas in State-managed industries or to generate funds for the State.</li> <li>• Confiscation of passports, use of threats and violence.</li> <li>• Other States may be aware or even complicit as destination of the trafficked workers or through trade agreements.</li> </ul>
<b>Scenario 2</b> <b>Informal participation of State organs/officials in modern slavery</b>	<ul style="list-style-type: none"> <li>• Active participation or cooperation of a public official in the smuggling and exploitation of migrants by private companies or in the deployment of forced labour at the local and national level.</li> <li>• Usually involving physical abuse, withholding of wages and confiscation of passports.</li> <li>• State may not be aware, but the action could still be attributable to it.</li> </ul>
<b>Scenario 3</b> <b>Diplomatic involvement in domestic servitude</b>	<ul style="list-style-type: none"> <li>• Trafficking and exploitation of migrant domestic workers employed in diplomatic households.</li> <li>• Confiscation of passports; physical, psychological and sexual abuse; difficulties in accessing justice due to the extensive scope of diplomatic immunity.<sup>4</sup></li> <li>• Increasing number of proceedings before domestic courts in the UK, the US or Australia.<sup>5</sup></li> <li>• Receiving States play a key role in ensuring a way out for victims (visa regimes; kafala system).</li> </ul>
<b>Scenario 4</b> <b>State-backed labour brokerage practices facilitating human trafficking</b>	<ul style="list-style-type: none"> <li>• Certain practices related to labour brokerage increase workers' vulnerability to human trafficking and forced labour (payment of recruitment fees leading to debt bondage).</li> <li>• Abusive practices of some labour brokers: threats, intimidation, retention of identity documents, use of violence.</li> <li>• Some States turn a blind eye to those practices used by employment agencies regulated, licensed or owned by them.</li> <li>• Negotiation and implementation of some government-to-government memoranda of understanding (MoUs) is arbitrary and corrupt.</li> </ul>
<b>Scenario 5</b> <b>States funding modern slavery through export credit agencies</b>	<ul style="list-style-type: none"> <li>• States could be funding projects tainted by modern slavery through the loans, insurance and guarantees executed by national export credit agencies (ECAs).</li> <li>• International standards call for enhanced monitoring and human rights due diligence (UN Guiding Principles on Business and Human Rights, OECD Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence ('the OECD Common Approaches'))<sup>6</sup>.</li> </ul>

<sup>3</sup> 1926 Slavery Convention, 1956 Complementary Convention, 2000 Palermo Protocol and 1930 ILO Convention against Forced Labour. Certain forms of forced labour are exempt from prohibition set out in the ILO Convention.

<sup>4</sup> Report of the UN Special Rapporteur on Contemporary Forms of Slavery (2018), including its causes and consequences, 27 July, A/HRC/39/52, para 37.

<sup>5</sup> In the UK, *Reyes v Al Malki* was a landmark case in which the UK Supreme Court considered the implications of human trafficking for the scope of diplomatic immunity (Webb, P., "Introductory Note to *Reyes v Al-Malki and Another* (UK SUP CT)", *International Legal Matters*, vol. 57, 2018).

<sup>6</sup> Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/38/48, 2 May 2018; OECD Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence, 2016, TAD/ECG (2016)3, para 10.

### Legal policy recommendations for strengthening efforts against modern slavery

The following legal policy recommendations aim at providing clarity on the potential of the international framework of State responsibility to tackle modern slavery more effectively. Having analysed through the lens of State responsibility the good and bad practices of States and observed which avenues are being used to protect victims and to hold States accountable, the following recommendations indicate new avenues for accountability, better protection of victims and more effective work towards the achievement of SDG 8.7.

#### a) Using existing international mechanisms to tackle modern slavery

The existing international legal framework provides various mechanisms for States to tackle slavery more effectively. States are encouraged to:

- i. Co-operate with each other and with the United Nations to give effect to the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. This includes communicating to the Secretary-General of the United Nations any measures adopted to implement the Convention. Under Article 8.3, the Secretary-General shall communicate that information to the other Parties and to the ECOSOC as part of the documentation for any discussion which the Council might undertake with a view to making further recommendations for the abolition of slavery, the slave trade or the institutions and practices which are the subject of the Convention.
- ii. Use the ILO mechanisms in place, particularly the complaint mechanism against member States. Non-ILO members are encouraged to accept the obligations of the ILO Constitution and Conventions. Those member States that have not done so yet, are encouraged to consider ratifying the ILO Conventions.
- iii. Use existing human rights mechanisms to tackle modern slavery, by addressing structural situations and policies (eg economic migration) that may create the circumstances for unlawful behaviours amounting to modern slavery. The Palermo Protocol, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women or the Convention on the Rights of the Child provide mechanisms for inter-state dispute or complaints mechanisms that could be used for those purposes.<sup>7</sup>

#### b) Tackling corruption and enhancing monitoring over State-backed entities to avoid State responsibility

One of the challenges of tackling modern slavery is plausible deniability of States, which may characterise slavery as sponsorship, military work, community work or just isolated cases of corrupt officials. Lack of transparency and weak monitoring mechanisms are also identified as challenges. States are encouraged to:

- i. Strengthen controls to identify corrupt officials and networks and to set effective penalties for corruption in line with the UN Convention against Corruption and to instruct public officials on modern slavery and its consequences as part of routine training.

- ii. Increase transparency and monitoring mechanisms in the way government-to-government Memoranda of Understanding (MoUs) for migration of workers are negotiated and implemented.
- iii. Implement enhanced monitoring and human rights due diligence in accordance with the UN Guiding Principles on Business and Human Rights and the OECD Common Approaches, particularly concerning Export Credit Agencies.

#### c) Preventing vulnerability and ensuring a way out for victims

One of the groups at a higher risk of becoming victims of modern slavery are migrant workers, particularly women. The role that States can play in this context by creating 'viable, accessible and non-discriminatory employment options for women'<sup>8</sup> is crucial to prevent vulnerability, ensure a way out for victims and avoid the potential responsibility that a lack of action could entail. States are encouraged to:

- i. Revise visa requirements for overseas domestic workers to provide them a safe way out of potentially abusive situations by guaranteeing their right to change employer and by allowing them to apply for annual extensions. States with a kafala system are encouraged to revise it to protect potential victims of modern slavery, enabling them to change employer and leave the country without permission of their employer. All workers should enjoy equal protection under domestic labour law.
- ii. Perform human rights impact assessments on any legislation on borders and passport controls, in order to reduce vulnerability of victims of trafficking to practices such as confiscation of identity documents.
- iii. Prohibit recruitment fees in their domestic law and enhance controls and inspections to ensure that employment agencies do not tolerate or use abusive practices; ensure that their legal and judicial system guarantees migrant workers' rights, in particular the right to remedy, and that extraterritorial jurisdiction is used to end impunity of companies operating abroad; follow the ILO General principles and operational guidelines for fair recruitment (2016).
- iv. Follow ILO 201 Recommendation on Decent Work for Domestic Workers and promising practices in prevention and protection of victims (OSCE Handbook, US TIP Office and DLA Piper Model Contract of Employment<sup>9</sup>).

#### d) Ensuring that immunity does not prevent victims from obtaining redress

When the modern slavery situation has been committed by a State or one of its officials, immunity from jurisdiction is a common barrier to redress for victims. States are encouraged to:

- i. Waive the immunity from jurisdiction of public officials when there are credible allegations of their involvement in modern slavery, in the territory of the State or in a foreign country; give a prospective waiver of immunity for employment-related disputes when there is a reasonable basis to believe that gross violations of human rights of domestic servants could have been committed; cooperate with foreign courts' investigations of such allegations.

<sup>7</sup> Also relevant is art. 24.c of the Council of Europe anti-trafficking convention, which considers the involvement of public officials as an aggravating circumstance. The Global Compact for Migration adopted on 10 December 2018 contains several provisions on modern slavery.

<sup>8</sup> Report of the UN Special Rapporteur on Contemporary Forms of Slavery (2018), including its causes and consequences, 27 July, A/HRC/39/52, paras 43 and 82.

<sup>9</sup> <https://www.state.gov/j/tip/c73528.htm>

- ii. Revise employment laws so that overseas domestic workers in diplomatic households are employed by the foreign State. This would allow victims to sue the State instead of the diplomat and to benefit from the employment exception to State immunity. To avoid that service of process becomes a barrier to redress, States may agree to permit channels of transmission other than those provided for in the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, such as direct communication between respective authorities.

Domestic courts are encouraged to:

- i. Develop the idea in the UK Supreme Court *Reyes v. Al-Malki* [2017] UKSC 61 to interpret the commercial exception to diplomatic immunity in Article 31(1)(c) Vienna Convention on Diplomatic Relations to cover exploitation of domestic workers. This would allow those courts of receiving States to prosecute diplomats in post involved in the exploitation of domestic workers and hold them to account.
- ii. Consider the application of exceptions to State immunity from jurisdiction when there are credible allegations of the involvement of a public official or body in modern slavery. Examples of these exceptions are the commercial activity or territorial tort exceptions to State immunity.

#### e) Putting pressure on other States through sanctions

States and international organizations such as the UN or the EU are encouraged to:

- i. Consider imposing economic, commercial or other types of sanctions within their respective legal frameworks to put pressure on States if there is a sufficiently solid factual basis to believe that they are committing modern slavery offences. The decision on the adoption of those sanctions should take into consideration any potential collateral effects.
- ii. Consider adopting legislation allowing for targeted sanctions or visa bans on individuals who have committed human rights violations in other States.

#### f) Invoking State responsibility and countermeasures

Under certain circumstances a State could invoke the international responsibility of another State under Articles 42 and 48 ARSIWA, if it commits an internationally wrongful act engaging in modern slavery. This can be done through international litigation, as well as in fora alternative to litigation such as negotiation, mediation or arbitration.

States are encouraged to:

- i. Invoke the responsibility of another State for failing to investigate and prosecute with due diligence non-state actors committing modern slavery offences, as well as corrupt officials that may facilitate the commission of modern slavery offences (Article 4 ARSIWA).

State responsibility may be invoked through diplomatic protection by the State whose nationals are victims of modern slavery (Article 42 ARSIWA), or by other States based on erga omnes or erga omnes partes obligations (Article 48 ARSIWA).

- ii. Invoke the international responsibility of other States, if they commit an internationally wrongful act by engaging in modern slavery (Articles 42 or 48 ARSIWA).

If the wrongful act constitutes a serious breach of an obligation, States have a positive duty to cooperate in order to bring to an end such breach. They also have the obligations not to recognize the situation created by the internationally wrongful act and not to render aid or assistance in maintaining that situation (Article 41 ARSIWA).

- iii. Invoke the international responsibility of a State for aiding or assisting another State in the commission of an internationally wrongful act (Article 16 ARSIWA)
- iv. Consider adopting countermeasures (Article 49 ARSIWA) against another State, if the latter commits an internationally wrongful act by engaging in modern slavery. Examples of possible countermeasures include asset freezes, import restrictions or travel bans.

### The project:

The project 'State responsibility for modern slavery: uncovering and bridging the gap' has been developed by Dr Philippa Webb and Dr Rosana Garciandia (King's College London), in cooperation with the United Nations University, with the support of the British Academy Scheme Tackling the UK International Challenges 2017. It has been developed in two phases:

#### Phase 1: Evidence analysis: scenarios

Analysis of existing evidence to identify patterns of State involvement in modern slavery that could give rise to their responsibility. Working closely with the United Nations University and cooperating with organisations and professionals who work in the front line, the team identified five scenarios in which the involvement of the State would justify the attribution of the action of a State official, body or entity to the State.

#### Phase 2: Legal analysis and recommendations

Study of the fact patterns through the lens of State responsibility and development of legal policy recommendations. This was done in consultation with experts from States, international organisations and civil society organisations, including the UN Special Rapporteur on Contemporary Forms of Slavery, the OSCE, ILO, practitioners and eminent academics in international law and modern slavery.

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