

State responsibility for modern slavery - Diplomatic involvement in domestic servitude

The project: uncovering and bridging a 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 40.3 million people in modern slavery on any given day in 2016.¹ States committed to fight against it in the 2030 Sustainable Development Agenda (SDG 8).

The efforts of States against modern slavery are mainly focused on their responsibility to ‘prevent, protect and punish’ offences committed by non-state actors. This project² goes beyond that approach by focusing on the involvement of the State in the commission of the offence through State policy (direct) or through the actions or omissions of a State organ or official (indirect). It presents proposals that will contribute to strengthening the efforts of the international community in tackling modern slavery, by unfolding the potential of State responsibility to offer an avenue for accountability as well as a tool for resolution of disputes between States.

Fact patterns

Migrant domestic workers employed in diplomatic households constitute one of the groups most vulnerable to modern slavery. They may be exploited, have their passport confiscated and be subject to physical, psychological and sexual abuse. Their situation is even more precarious in accessing justice due to the extensive scope of diplomatic immunity.³

Diplomatic involvement in this form of modern slavery has become increasingly visible through court proceedings and thanks to the work of organisations protecting the victims in States such as the UK, the US or Australia.⁴ Despite progress in identifying and sharing promising practices for prevention,⁵ accountability of offenders and redress to victims continue to encounter significant challenges, especially given the protection of diplomats.

Recommendations for strengthening efforts against modern slavery

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’⁶ is crucial to prevent vulnerability, ensure a way out for victims and avoid the potential responsibility that a lack of action could entail.

¹ Global Estimate of Modern Slavery, September 2017; ILO, Walk Free Foundation.

² The project “State responsibility for modern slavery: uncovering and bridging the gap” has been developed by Dr Philippa Webb and Dr Rosana Garcíandia (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. The views expressed are the authors’ own and not attributable to the UNU or the British Academy.

³ 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.

⁴ 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).

⁵ OSCE, *How to Prevent Human Trafficking for Domestic Servitude in Diplomatic Households and Protect Private Domestic Workers*, 2014.

⁶ 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.

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. 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 Employment⁷).
- iii. 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.
- iv. 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.
- v. Invoke the responsibility of another State for failing to investigate and prosecute its diplomatic agents 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).
- vi. Consider adopting countermeasures (Article 49 ARSIWA) against another State, if the latter commits an internationally wrongful act by engaging in modern slavery through the actions of its diplomatic agents or embassies. Examples of possible countermeasures include asset freezes, import restrictions or travel bans.

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.

⁷ <https://www.state.gov/j/tip/c73528.htm>