

State responsibility for modern slavery - State-backed labour brokerage and labour trafficking

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

Certain practices related to labour brokerage increase workers' vulnerability to human trafficking and forced labour.³ Some of those practices, such as payment of recruitment fees, are legal but could open the door to modern slavery offences. Other practices, such as threats, intimidation, retention of identity documents and physical or sexual violence, are abusive and fraudulent and may in certain cases amount to modern slavery offences.

States, which regulate or license employment agencies and sometimes own and administer them, are generally aware of the relevance of a transparent recruitment system and some of them are taking steps in that direction, such as the prohibition of abusive recruitment fees and the negotiation of bilateral agreements between sending and receiving countries. However, government to government memoranda of understanding (MOUs) appear to be ineffective and do not deliver as good solutions as they are meant to. Corruption is usually entrenched in the execution of those agreements and the selection of sectors to be regulated by MoUs is often based on random criteria such as easiness to conclude agreements instead of assessment of sectors in need of regulation. States may also be facilitating modern slavery through their policies on visas or language tests and with State behaviours harassing migrants, such as the deportation of migrant women or not granting job portability.

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 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. The views expressed are the authors' own and not attributable to the UNU or the British Academy.

³ See ILO, *Profits and Poverty: The Economics of Forced Labour*, 2014; Andrees, B., Nasri, A., Swiniarski, P., *Regulating labour recruitment to prevent human trafficking and to foster fair migration: Models, challenges and opportunities*, ILO, 2015; Gordon, J., *Global Labour Recruitment in a Supply Chain Context*, ILO, 2014; Verité, Freedom Fund, *An Exploratory Study on the Role of Corruption in International Labour Migration*, January 2016.

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'⁴ 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 Employment⁵); 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.
- v. Revise visa procedures and language tests for migrants to ensure that they are not discriminatory and that they do not increase vulnerability of migrants to trafficking. They are also encouraged to use visa procedures to identify potential victims of human trafficking and labour exploitation, and to identify the traffickers.
- vi. Pay special attention to corruption of State officials and departments in connection with labour brokerage and allocate resources to training of public officials on modern slavery and on the consequences of committing modern slavery offences.
- vii. Increase transparency and monitoring mechanisms in the way government-to-government Memoranda of Understanding (MoUs) are negotiated and implemented. Within this process, they are encouraged to run an assessment of the impact those MoUs may have in the migrant population and their rights.
- viii. Invoke the responsibility of another State for failing to investigate and prosecute with due diligence employment agencies committing modern slavery offences, as well as corrupt officials that may

⁴ 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.

⁵ <https://www.state.gov/j/tip/c73528.htm>



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).